APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed August 4, 2005]

Nos. 03-CV-615 & 03-CV-634

BREEZEVALE LIMITED,
Appellant/Cross-Appellee,

v.

TIMOTHY L. DICKINSON, *et al.*,
Appellees/Cross-Appellants.

Appeals from the Superior Court of the
District of Columbia
(CA-10818-94)

(Hon. Steffen W. Graae, Trial Judge)

(Argued December 8, 2004 Decided August 4, 2005)

Before SCHWELB and REID, *Associate Judges*, and STEADMAN, *Senior Judge*.

STEADMAN, *Senior Judge*: This case comes to us for the second time on an appeal from a trial court order imposing upon appellant Breezevale a total of $5,061,353 in attorneys' fees and punitive damages, in addition to dismissal of its cause of action for legal malpractice, as a consequence of the trial court's finding by clear and convincing evidence that Breezevale knowingly brought the litigation in principal reliance upon documents that it knew to be forgeries. We sustain the dismissal and the award of attorneys' fees. Both of these sanctions in the circumstances here bear punitive ele-

ments, a factor that the trial court did not sufficiently take into account. Accordingly, we vacate the separate award of punitive damages as excessive. In all other respects, we affirm.

I. Litigation History

The circumstances behind the litigation in this case and the trial court's imposition of sanctions have been set forth at length in the prior appeal to this court and need only be briefly outlined here. *See Breezevale Ltd. v. Dickinson*, 759 A.2d 627 (D.C. 2000) ("*Breezevale I*"). The present dispute began in October 1989, when Breezevale hired Gibson, Dunn & Crutcher LLP ("GDC") to represent the company in a contractual dispute with Bridgestone-Firestone, Inc. ("Firestone"). During trial preparation, it came to light that Rebecca Paul, a Breezevale employee, intended to testify during her deposition that she had personally forged documents, namely spreadsheets and offer letters, which related to Breezevale's claims against Firestone. Moreover, Ms. Paul maintained that these forgeries were performed at the direction of and with the participation of top Breezevale executives.

GDC's response to Ms. Paul's revelation is what formed the basis for Breezevale's malpractice action. Rather than postpone the deposition, GDC elected to go forward as planned; GDC did not initially notify Breezevale of Ms. Paul's anticipated testimony. When GDC did eventually alert a Breezevale executive to the impending testimony prior to the afternoon session of Ms. Paul's deposition, the executive immediately asserted that Ms. Paul was lying and asked GDC to delay the testimony until the allegations could be further investigated. GDC refused and Ms. Paul proceeded to give her damaging testimony. Firestone's attorneys immediately began drafting a motion to dismiss all of Breezevale's claims with prejudice as a sanction for fraud and misconduct. Upon

threat of imminent filing of the motion, and at GDC's behest, Breezevale settled with Firestone for $100,000.[1]

In October 1994, Breezevale brought a claim for legal malpractice against GDC in the District of Columbia Superior Court. In its complaint, Breezevale alleged that "[h]ad [GDC] conducted a competent and thorough investigation of [Ms. Paul's] allegations, they would have discovered that such allegations of wrongful conduct by Breezevale or its principal executives were untrue." According to Breezevale, by not conducting an adequate investigation of the employee's allegedly false claims, GDC violated the legal standard of care and irreparably damaged Breezevale's suit against Firestone. Thus, in its malpractice suit against GDC, Breezevale continued to assert that the allegedly forged documents were in fact genuine, and litigated its claim in Superior Court accordingly.

A seven-week trial was held during which the parties litigated both the legal malpractice claim and the underlying "case within a case" in order to determine what a "hypothetical jury" would have awarded Breezevale had its case against Firestone actually gone to trial. Utilizing a special verdict form, the jury found in favor of Breezevale on the legal malpractice claim. Specifically, the jury found that GDC had breached the standard of care in its representation of Breezevale and thereby proximately caused damage to Breezevale's case against Firestone. However, the jury further found that forgeries did in fact occur with the participation of "one or more Breezevale executives." Nevertheless, the jury also found that such forgeries did not "play[] a substantial part in damaging" Breezevale's lawsuit against Firestone and that Breezevale still would have won three of its claims for a total of $3,430,000.

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[1] Prior to Ms. Paul's testimony, Breezevale had rejected a settlement offer of $3.5 million.

Notwithstanding the jury's verdict, the trial court entered judgment as a matter of law in favor of GDC. In the alternative, the court granted GDC's motion for a new trial. In addition, the trial court granted GDC's equitable counterclaim for "bad faith litigation." Consistent with the jury's factual finding by a preponderance of the evidence, the court found by clear and convincing evidence that forgery had occurred with the participation of one or more Breezevale executives. Accordingly, the court concluded that Breezevale acted in "bad faith" by continuing to maintain before the court that the documents were not forgeries and that the employee was lying, despite the overwhelming evidence to the contrary. Proclaiming that it was "difficult to imagine a clearer case of bad faith litigation," the court imposed the following sanctions: (1) $4,061,353 for GDC's fees and costs in litigating the malpractice action; (2) $1,000,000 in punitive damages; and (3) $295,280 in unpaid legal fees.

On appeal, this court addressed a number of Breezevale's arguments. First, the court concluded that the trial court erred in awarding judgment as a matter of law because "[l]ooking at the record in the light most favorable to Breezevale," it could not "agree with the trial court that there was no evidence from which a reasonable jury could find" in Breezevale's favor. *Breezevale I*, 759 A.2d at 634. Second, the court remanded the case to the trial court to "consider further its grant of a new trial," since the trial court's "summary grant of a new trial by reference to the judgment notwithstanding the verdict, without express consideration of the evidence on both sides and its relative weight, cause[d] difficulty in terms of appellate review." *Id.* at 638. As to sanctions, the court vacated all sanctions "without prejudice to a decision whether to impose an award following an exercise of discretion based on correct legal principles." *Id.* at 640. The court was careful to caution, however, that it did "not intend to suggest that Breezevale [was] necessarily beyond the sanctioning power of the trial court on remand," nor that "the trial court lack[ed]

authority to sanction parties for illegal or unethical litigation tactics simply because their substantive claims have some merit."[2] *Id.* A rehearing *en banc* was held, whereupon the *en banc* court "adopt[ed] and reaffirmed] the appellate rulings . . . ." *Breezevale Ltd. v. Dickinson*, 783 A.2d 573, 575 (D.C. 2001) ("*Breezevale II*").

On remand, the trial court focused on the issue of sanctions. First, the court ruled that Breezevale was not entitled to a new hearing on sanctions, declaring that "[Oven the exhaustive litigation of the forgery issue before the jury, there would have been no point in additional proceedings before the bench on the very same question." Second, the court granted the "ultimate sanction" of dismissal of Breezevale's claim. Reasoning that "the forgery issue should never have been made central to [the malpractice case]" and "[My making it a major component of its malpractice suit against GDC, Breezevale perpetrated a fraud on the court," the court concluded that dismissal of the action was justified under the circumstances. Third, the court reimposed the same monetary sanctions, ordering Breezevale to pay $4,061,353 in attorneys' fees and costs, and $1 million in punitive damages.[3]

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[2] Judge Schwelb wrote a concurring opinion in which he was even more explicit:

> [The trial court's findings] find overwhelming support in the record, and they must ultimately inform the court's exercise of discretion in the imposition of sanctions. I think . . . . it is significant that Breezevale's key allegation in the malpractice case was untrue and known by Breezevale to be untrue. The testimony offered in support of that allegation was likewise false. The final disposition of this case should reflect this underlying reality.

Id. at 642 (footnote omitted).

[3] The court did, however, enter judgment for Breezevale on GDC's counterclaim for unpaid fees and costs related to the Firestone litigation, finding that "the value of GDC's representation was so diminished after the breach that it would be inequitable to make Breezevale pay for any part of it." GDC does not appeal from this ruling. Finally, as an alternative

The punitive damages were awarded based upon "Breezevale's persistent refusal to acknowledge its wrongdoing." Breezevale filed a timely appeal, and we find ourselves yet again addressing this dispute.

II. Substantive Findings

Breezevale challenges the substantive findings of the trial court on three grounds. We conclude that each claim lacks merit.

A.

Breezevale first asserts that the evidentiary record before the trial court did not support its finding by clear and convincing evidence that the documents were known forgeries, which formed the basis of the court's order of sanctions against Breezevale. Although GDC initially filed its request for sanctions against Breezevale as a "counterclaim," the trial court's (as well as our own) treatment of the issue is more appropriately viewed as a motion for sanctions based upon "abuse of the judicial process." *See Breezevale I*, 759 A.2d at 639 n.18. The trial court has inherent power to sanction parties for intentionally abusing the litigation process. *Id.* We made clear in *Breezevale I* that, given this inherent power, "sanctions may properly be imposed against a party found to have forged documents in an apparent attempt to bolster a portion of its case and then steadfastly lied about it while litigating another case . . . ." *Id.* at 639. Accordingly, sanctions may properly lie against *Breezevale* so long as there is sufficient evidence that Breezevale knew the documents at issue were forgeries, yet continued to assert that they were genuine. The trial court so found, and its "findings of fact can be reversed only if they are plainly wrong or without evi-

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to its sanction of dismissal, the court granted GDC's motion for a new trial. In light of our disposition affirming the dismissal of Breezevale's claim, we need not address this ruling.

dence to support them." *Jemison v. Nat'l Baptist Convention, USA, Inc.*, 720 A.2d 275, 281 (D.C. 1998).

There was ample evidence supporting the court's finding that documents were forged with the knowledge and participation of Breezevale executives. First, there was the testimony of Rebecca Paul, the Breezevale employee who initially revealed that the documents were forged. Ms. Paul testified that she was directed by Breezevale executives in February 1991 to manufacture spreadsheets and offer letters and to "back date" them to November and December 1987. Ms. Paul described in some detail how she and Abou Jaoude, a Breezevale executive, worked together to forge documents over the course of three days in February 1991. The court credited Ms. Paul's testimony, pointing out that she had no discernable motive to lie. Breezevale asserted that Ms. Paul made up her testimony in an effort to sabotage the company. The court found Breezevale's position implausible, however, since it would require an otherwise loyal employee of ten years to sacrifice her job, implicating herself in serious misconduct and committing perjury in the process, for no plausible reason. We agree, and defer to the trial court's positive assessment of Ms. Paul's credibility.

In addition to Ms. Paul's testimony, there were several other notable pieces of evidence which support a finding of forgery. The documents at issue were purportedly hand-delivered between Beirut and Iraq in 1987. However, considering that Breezevale's normal course of transmitting offer letters in 1987 was to send them via Telex communications, there appears no logical explanation for why hand-delivery was opted for on this occasion. Several former Breezevale employees testified that all Breezevale-Iraq business was handled through the London office. Although one Breezevale executive, Jaoude, testified to the contrary, the trial court discredited his testimony as self-serving and incredible. The court concluded that "it would defy common sense and good

business practice to hand deliver offer letters from Beirut when instant and far more reliable communication was available via London," and this conclusion finds support in the record.

Moreover, the trial court found it especially "puzzling" that Jaoude never signed any Firestone-related documents sent to Iraq before or after 1987, despite his testimony that he was responsible for that business beginning in 1985. Jaoude was also the only witness who testified to having actually seen the disputed documents in 1987. Although all records pertaining to Breezevale's Iraq business were maintained in London, these particular documents, purportedly prepared in 1987, did not find their way to the London office until February 1991. The court found it telling that neither the secretary who allegedly typed the documents, nor the employee who allegedly delivered them to Baghdad, were called to testify; nor was the pre-1991 typewriter on which some of the documents were claimed to have been typed, introduced into evidence.

The court also based its finding on a detailed examination of the documents themselves, which were admitted into evidence. A document dated February 25, 1987 was computer generated, even though by Jaoude's own testimony, Breezevale did not yet own computers at that point. Although Breezevale claimed that Ms. Paul fabricated this particular document on her own initiative, this explanation was belied by Jaoude's handwritten notations on the document. A computer evidence expert testified that both this document and a similar one with Jaoude's handwriting on it were produced on Ms. Paul's computer with a last access date of February 21, 1991, thus corroborating Ms. Paul's testimony that the documents were created at that time. Other evidence of forgery includes the fact that two documents (each with Jaoude's signature) were typed on a letterhead which did not

exist in 1987.[4] Although Jaoude denied having signed these documents, the court credited the testimony of a handwriting expert who concluded with "no reservation whatsoever" that it was indeed Jaoude's signature on the documents. In short, the court found that the evidence lead to the "inescapable conclusion" that the documents at issue were forged, and this conclusion is supported by substantial evidence in the record.

Breezevale argues that even if there was clear and convincing evidence of forgery, there was insufficient evidence to show that the top two Breezevale executives, Habib Bou Habib and Charles Awit, participated in or were aware of such forgery.[5] Breezevale contends that so long as these executives believed that the documents were genuine, it could not constitute "bad faith" for Breezevale to have maintained as such at trial. We note at the outset that the crucial determination supporting the court's finding of bad faith litigation is the knowledge of Breezevale executives at the time they instituted the malpractice action against GDC, rather than at the time the forgery occurred. Regardless of whether Breezevale executives knew of the forgery prior to Ms. Paul's revelation, once Ms. Paul's allegations came to light, Breezevale was on notice of potential forgery. *Cf. Clay Properties, Inc. v. Washington Post Co.*, 604 A.2d 890, 896 (D.C. 1990) (*en banc*) (discussing circumstances where a person of ordinary prudence is required to make inquiry or investigate further). Once these serious allegations were made, it became incumbent upon Breezevale to conduct a thorough investigation. At the very least, Breezevale executives would be expected to gain reasonable assurance that the documents

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[4] The letterhead contained the name and address of "Breezevale Incorporated, New Jersey," a subsidiary that had not yet been formed.

[5] Jaoude was the second highest ranking officer at Breezevale from 1982 until 1995. At the time of trial, however, he was no longer working in an official capacity with Breezevale, although he was admittedly still closely associated with the company.

were genuine prior to initiating a law suit in which they would make such a representation.[6]

As the preceding discussion illustrates, there was substantial evidence showing that the documents were in fact forgeries; indeed, the evidence was "clear and convincing." Inquiry would have indicated what both a jury and a trial court found evident—that the documents were forgeries, and it is not unreasonable to infer that such an inquiry was in fact made or deliberately avoided. Under the circumstances, all three Breezevale executives must be deemed to have known that the documents were forged by the time they initiated the malpractice claim against GDC.

In any event, there was clear evidence to support a finding that each of the three top Breezevale executives participated in the forgery scheme. Ms. Paul's testimony, which was credited by the trial court, not only implicated Jaoude in the forgery, but Habib and Awit as well. She testified that when she informed Habib that there were no Iraq offers in 1987, he responded to her that "we better think about making sure there [are]." Soon afterwards, Jaoude directed her to start forging spreadsheets and offer letters. Ms. Paul also testified that she observed several conversations between Jaoude and Awit during which they discussed the logistics of the forgery scheme. As the date of her deposition approached, Ms. Paul personally notified Habib on four different occasions that she was afraid of having to testify falsely under oath regarding the documents. According to Ms. Paul, Habib responded that she should not be nervous and that she could probably

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[6] Closely analogous, Rule 11 imposes an obligation to conduct a *reasonable inquiry* prior to filing a complaint so as to ensure that the allegations and other factual contentions have evidentiary support. Super. Ct. Civ. R. 11(b)(3); *see Cunningham v. Bathon*, 719 A.2d 497, 499 (D.C. 1998) (imposing sanctions on a litigant and his attorney for failing to conduct a reasonable inquiry prior to filing a complaint alleging *inter alia* fraud).

"outsmart them." Clearly, if Ms. Paul's testimony is credited, it serves as compelling evidence that the top Breezevale executives were complicit in the forgery scheme. The trial court, which observed Ms. Paul's testimony and also had heard testimony from the top three executives, credited this testimony, and its finding that the forgery was done with the knowledge of Awit and approval of Habib, is therefore not "plainly wrong or without evidence to support" it. *Jemison*, 720 A.2d at 281.

B.

Breezevale next argues that even if the evidentiary record as it stood before the trial court was sufficient, Breezevale was entitled to an additional hearing to present further evidence on the precise issue. A trial court's determination whether or not to conduct an evidentiary hearing is reviewed for abuse of discretion. *See Peddlers Square, Inc. v. Scheuermann*, 766 A.2d 551, 559 (D.C. 2001) (finding no abuse of discretion where trial court denied a hearing on a motion for sanctions). We are satisfied that Breezevale was afforded a full opportunity to present its case both as to whether the documents were in fact forged and whether the top executives knew them to be so, and that it was not an abuse of discretion for the trial court to deny Breezevale's request.

Breezevale asserts that "due process principles" mandate it be afforded the requested hearing. Breezevale's position is not supported by our case law. Although a party "is entitled at least to a meaningful opportunity to argue, either in open court or on paper, against the imposition of any sanctions against him . . . a full evidentiary hearing may not be necessary." *Brady v. Fireman's Fund Ins. Cos.*, 484 A.2d 566, 569 (D.C. 1984). Thus, it was not error to deny Breezevale's request for a hearing, so long as Breezevale had sufficient opportunity to contest the underlying facts and to address the issue of sanctions.

Unquestionably, Breezevale had notice very early on that it was potentially subject to sanctions. GDC first raised its "counterclaim" alleging bad faith litigation in its answer to Breezevale's complaint. Breezevale's first opportunity to contest these claims occurred when it filed a "Motion To Dismiss The Bad Faith Litigation Counterclaim." The trial judge denied this motion in an order dated January 11, 1996 stating that "[t]here is no question that sanctions and attorneys' fees are appropriately imposed for improper trial tactics and bad faith litigation . . . ." (quoting *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989)). Thus, it was apparent that the bad faith litigation claim would be a part of the case, and Breezevale had every reason to contest it during the ensuing seven-week trial.[7]

Breezevale contends that while it may have had an opportunity at trial to argue that the documents were not forgeries, it did not have any incentive to argue that the top Breezevale executives had a good faith belief that the documents were genuine. This position is puzzling. From the very beginning it was evident that the case involved questions not only whether the documents were forged, but also whether they were forged with the knowledge and participation of Breezevale executives. Indeed, the jury instructions required the jury to determine whether forgeries occurred and "if so, that one or more Breezevale executives participated in

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[7] One colloquy involving both parties and the judge is particularly noteworthy:

> [GDC]: If I can clarify one more time for the record. We plan to argue, and we will be permitted to argue, that this is bad-faith litigation and fraud on the court in our opening statements to the jury.
>
> THE COURT: I don't know why you shouldn't be allowed to do that, since that is one of the underlying bases of your defense, that this lawsuit doesn't have a factual basis. That is your claim; isn't it?
>
> [GDC]: That is certainly one of them.

such forgeries." All three top executives in fact testified at length at trial. Evidence of its executives' good faith belief that the documents were genuine would tend to show not only that they did not participate in the forgery scheme, but cast doubt on the forgery issue itself by impeaching Ms. Paul's veracity. The proposition that there was no incentive at trial for Breezevale to argue that the top executives believed the documents to be genuine is dubious to say the least.[8]

Nor was Breezevale's opportunity to argue against the imposition of sanctions limited to the trial. At the conclusion of trial, Breezevale filed an 85-page brief titled "Plaintiff's Memorandum Of Points And Authorities In Opposition To Defendants' Motion For Dismissal And Other Sanctions." On remand, after issuance of this court's decisions in *Breezevale I* and *Breezevale II*, GDC filed a "Second Renewed Motion For Sanctions." Breezevale responded by filing a 48-page "Memorandum Of Points And Authorities In Opposition To Defendants' Second Renewed Motion For Sanctions." Included with this filing were sworn affidavits from top Breezevale executives describing the bases for their "good faith belief' that the documents were genuine. Thus, when the trial court issued sanctions against Breezevale, it had evidence of the good faith belief of the top executives before it, but was clearly unpersuaded.

In short, Breezevale had multiple opportunities over the course of proceedings which spanned more than seven years to present the trial court with evidence of the top executives' good faith belief and to argue the issue of sanctions. Fur-

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[8] Breezevale argues that it did not present evidence of good faith belief at the trial because the trial court had "promised" a subsequent hearing on that issue. However, we can divine no such promise from the transcripts. In any event, Breezevale had every incentive to present this type of evidence in its post-trial motions. Notably, Breezevale did not invoke the trial court's so-called promise to hold a further evidentiary hearing in its 85-page brief opposing GDC's post-trial motion for sanctions.

thermore, the sanctions were imposed by a judge who had participated in every aspect of the proceedings. *See Peddlers Square, Inc.*, 766 A.2d at 559. The decision whether to grant an evidentiary hearing is squarely within the trial court's discretion, *see id.*, and given the judge's extensive experience with the parties in this case, including hearing trial testimony by all the relevant parties, we conclude that it was not an abuse of discretion to deny Breezevale's request for a further evidentiary hearing on an issue that had been extensively litigated and thoroughly briefed.

C.

Finally, Breezevale, rather remarkably, makes the strained assertion that the jury itself found that the documents were not forged, and therefore the trial court is "barred by the Seventh Amendment from revisiting the issue." Breezevale argues that the "Seventh Amendment demands that, if there is a view of the case which makes the jury's answers consistent, the court must adopt that view." Breezevale points to the jury's responses to questions #3 and #4, which indicate that although it believed forgeries occurred with the participation of one or more Breezevale executives, Breezevale's forgery of documents did not play a substantial part in damaging its lawsuit against Firestone.[9] According to Breezevale, the "consistent" view of the jury's answer is that the documents

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[9] Specifically, the instructions read:

> (3)Do you find that Gibson, Dunn, & Crutcher has established that forgeries occurred and, if so, that one or more Breezevale executives participated in such forgeries?
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> ANSWER: Yes
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> * * *
>
> (4)Do you find that Gibson, Dunn, & Crutcher has established that Breezevale's forgery of documents played a substantial part in damaging its lawsuit against Firestone?
>
> ANSWER: No

found to have been forged were not the offer letters and spreadsheets related to the lawsuit against Firestone, but rather other documents brought by Ms. Paul to her deposition, and that the "Breezevale executive" the jury found to have participated in the forgery was not either of Jaoude, Habib or Awit, but rather Ms. Paul herself.

Breezevale's reading of the jury's verdict simply does not withstand scrutiny against the backdrop of the actual litigation. The questions the jury was instructed to answer directly followed from the most intensely litigated issue of the case: whether the offer letters and spreadsheets were forged. It would strain reason to conclude that the jury interpreted question #3 to relate to documents other than those at the heart of the malpractice claim. Likewise, there is nothing to suggest that the jury believed that Ms. Paul, whose testimony was that she was following the instructions of her superiors, was the Breezevale "executive" referred to in the question. To the contrary, the only logical interpretation of the jury's answer to question #3 is that the offer letters and spreadsheets were forged (by Ms. Paul), and done so with the participation of at least one Breezevale executive (Jaoude).

Breezevale rests its argument on the court's instruction to the jury that in answering question #4, the jury would "necessarily have to decide if [Ms.] Paul told the truth or lied when she testified that offer letters and spreadsheets dated 1987, were prepared in February 1991, with the knowledge and participation of one or more Breezevale executives." According to Breezevale, since the jury found that the outcome in fact would have been different, it must "necessarily" have also found that Ms. Paul lied. Breezevale neglects to consider the very next sentence of the court's instruction, however, in which it goes on to explain that the "answer to this question [whether Ms. Paul lied] *is a factor* you should consider as you determine whether Breezevale would have obtained more than the $100,000 settlement it ultimately

reached with Firestone." Thus, the plausible reading of the jury's verdict is that although Ms. Paul told the truth about the forging of the offer letters and spreadsheets, Breezevale still had a strong enough claim that had her deposition been postponed, it could have successfully maintained its lawsuit against Firestone. *See Breezevale I*, 759 A.2d at 634 ("This jury knew of Breezevale's fraud and concluded that Breezevale nonetheless would have prevailed at trial. We do not think this conclusion was without any support."). The trial court was also cognizant of this likelihood: "[t]he irony is that Breezevale had a strong case for legal malpractice against GDC, regardless of how the forgery issue played out . . . . Postponing Ms. Paul's deposition would at least have bought time for GDC and Breezevale to consider their options and develop a strategy for dealing with the problem." Accordingly, we conclude that the trial court's finding was not inconsistent with the jury's findings; rather, the findings were wholly consistent.

III. Sanctions

Satisfied that there was sufficient support for the trial court's finding that Breezevale litigated its malpractice claim against GDC in bad faith, we now turn to the question of the sanctions imposed by the trial court. Breezevale raises certain arguments why each of the sanctions in itself was impermissible, as well as attacking the overall weight of the sanction. We address each argument in turn.[10]

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[10] As an initial matter, Breezevale, citing *Temple v. District of Columbia Rental Hous. Comm'n*, 536 A.2d 1024, 1031 (D.C. 1987), argues that because of GDC's own alleged misconduct, GDC should be barred by the doctrine of "unclean hands" from recovering sanctions. The trial court rejected this argument as meritless in an order dated October 16, 1997. Breezevale did not raise this issue in its first appeal, and we have no cause to revisit it here. *See Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1215 (D.C. 2002) ("[I]t is a general principle of appellate practice that where an argument could have been raised on an initial appeal, it is

A.

Breezevale contends that the dismissal of its suit was an extreme and unwarranted sanction. Indeed, "[d]ismissal is an extreme sanction which should be granted only sparingly or in extraordinary circumstances." *District of Columbia v. Serafin*, 617 A.2d 516, 519 (D.C. 1992). Nevertheless, we have recognized that dismissal is an appropriate sanction where a party "engage[s] in conduct utterly inconsistent with the orderly administration of justice." *Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254, 1264 (D.C. 1986) ("*Synanon I*") (quoting *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983)). In *Synanon I*, the trial court found that a fraud upon the court was committed where there was evidence that Synanon executives had deleted, burned and hidden incriminating information in the company's archives in an effort to avoid discovery of these materials. *See id.* at 1261. Based upon this finding of fraud, the trial court dismissed Synanon's complaint. *See id.* at 1262. On appeal, we affirmed, finding "ample evidence in the record to support [the trial court's] conclusion that the involvement of the Synanon executives and attorneys in the fraud, their subornation of perjury and their own false statements to [the trial court] constituted a fraud on the court, warranting dismissal of the complaint." *Id.*

We are satisfied that it was not impermissible for the court to dismiss Breezevale's complaint. "[C]ourts must be accorded considerable latitude in dealing with serious abuses of the judicial process and [] the trier's determination to dismiss a case for such a reason should be reviewed only for abuse of discretion." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1117 (1st Cir. 1989). Under the circumstances, the trial court had

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inappropriate to consider the argument on a second appeal following remand.") (quoting *Hartman v. Duffey*, 319 U.S. App. D.C. 169, 173, 88 F.3d 1232, 1236 (1996)).

ample reason for concluding that dismissal was an appropriate sanction. As the judge explained,

> It belabors the obvious to state that the entire Breezevale/GDC litigation, from first filings through discovery, motions practice, and trial was permeated by the forgery issue. The issue clearly interfered with "the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." GDC were forced to mount an enormous (but ultimately successful) attack on Breezevale's false claims of innocence; the jury had to sit through untold hours of complex testimony and argument to decide if Breezevale's documents were forged; and the trial judge then had to devote literally weeks of effort to comb through transcripts and records in order to address post-trial motions. For reasons Breezevale always knew but still refuses to acknowledge, the forgery issue should never have been made central to this case. By making it a major component of its malpractice suit against GDC, Breezevale perpetrated a fraud on the court which justifies dismissal of its action.

Breezevale's actions, as described by the trial court above, constitute "conduct utterly inconsistent with the orderly administration ofjustice," akin to that which we held warranted dismissal in *Synanon I. Id.* 503 A.2d at 1264. Accordingly, we affirm the trial court's imposition of this sanction.

B.

Next, Breezevale takes issue with the trial court's award of attorneys' fees. Here, Breezevale does not argue that the trial court lacked authority to award any attorneys' fees, but rather asserts that the trial court erred in not limiting its award of fees to expenses related to Breezevale's bad faith litigation tactics. Breezevale relies upon *Synanon Foundation, Inc. v.*

Bernstein, 517 A.2d 28 (D.C. 1986) ("*Synanon II*"), in which we held that "in an action not in itself brought in bad faith, an award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves." *Id.* at 38-39 (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1089 (2d Cir. 1977)). Citing *Breezevale I* and *II*, Breezevale contends that since its suit against GDC did not lack substantive merit, the trial court could not have found that it *brought* the litigation in bad faith, but rather could only have found that it *litigated* the suit in bad faith. Since the award of attorneys' fees was not limited to those portions of the suit litigated in bad faith, Breezevale maintains the trial court erred.

In *Synanon II*, we recognized a distinction between suits *filed* in bad faith and suits *litigated* in bad faith:

> [T]he conduct which would justify an award of bad faith attorneys' fees may be found either in the filing of a frivolous claim or in the manner in which a properly filed claim is subsequently litigated. . . .
>
> The measure of the fee award differs depending on which is the case. . . . [W]here a suit has been filed in bad faith, the court has discretion to award the entire legal expenses incurred by the defendant. Conversely, "in an action not in itself brought in bad faith, an award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves."

517 A.2d at 38-39 (citation omitted). We went on to explain that the reason for this distinction is to prevent attorneys' fees from becoming a guise for the award of punitive damages. "If a bad faith litigant is compelled to compensate his or her opponent for legal expenses unrelated to the conduct warranting an attorneys' fee award, that award is not truly

attorneys' fees at all but rather punitive damages under another name." *Id.* at 39.

While Breezevale's argument has merit as a general principle, we conclude under the circumstances of this case that the amount of attorneys' fees awarded by the trial court is sustainable. In *Synanon II*, we recognized that all attorneys' fees may be awarded from the point bad faith litigation tactics commence, even though some of those expenses would still have been incurred absent the bad faith conduct. As we explained in *Synanon II*:

> Synanon officials and attorneys, starting within three months after the complaint was filed, sought to corrupt the administration of justice by systematically destroying materials they thought subject to discovery. Regardless of the relevance of these materials to the substantive legal issues in the case, the cynicism of this behavior cannot be entirely extricated from the pattern of fraud perpetrated upon the trial court by Synanon. Such conduct was enough to completely taint Synanon's entire litigation strategy from the date on which the abuse actually began. . . .
>
> The award of bad faith attorneys' fees for all of the defendants' reasonable litigation expenses was therefore proper from the point in October . . . when [Synanon] began destroying evidence . . . .

517 A.2d at 43. We think this rationale applies to Breezevale's actions. Here, Breezevale's bad faith litigation tactics commenced on the date of its first filing against GDC, when it alleged in its complaint that "[h]ad [GDC] conducted a competent and thorough investigation of [Ms. Paul's] allegations, they would have discovered that such allegations of wrongful conduct by Breezevale or its principal executives were untrue." As in *Synanon II*, this bad faith allegation "was enough to completely taint [Breezevale's] entire litigation

strategy from the date on which the abuse actually began," i.e., the date the complaint was filed. Accordingly, GDC is entitled to the amount of attorneys' fees awarded by the trial court, despite the fact that Breezevale's claim had some substantive merit.[11]

C.

Finally, Breezevale asserts that the trial court was without authority to impose punitive damages. According to Breezevale, the law in the District of Columbia is that there can be no award of punitive damages absent a basis for compensatory damages. However, we have held that "the award of attorneys' fees [is] itself compensatory," and "[i]n the context of bad faith litigation, repayment of the fees incurred in defending against the litigation is properly treated as compensatory damages." *Jemison*, 720 A.2d at 284. The trial court did not lack authority to impose punitive damages as a sanction for Breezevale's bad faith litigation. Second, Breezevale argues that the issue of punitive damages is for the jury, not the trial judge, to consider. This position is likewise irreconcilable with *Jemison*. In *Jemison*, we affirmed the trial court's imposition of punitive damages, holding that "[p]articularly when the activity in question contains the elements of a classic intentional tort, for which punitive damages are permissibly granted, we see no reason why a court may not award punitive damages." *Id.* at 285 (footnote omitted).

Nonetheless, we conclude that the separate award of $1 million in punitive damages should be vacated. The other sanctions imposed by the trial court themselves bore "punitive" elements. First, the dismissal of Breezevale's claim

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[11] Given the way this litigation progressed and was presented, the great bulk of attorneys' fees would appear to have been incurred in litigating the forgery issue. In any event, the portions of attorneys' fees otherwise directed can fairly be treated as permissible punitive damages, as discussed *infra* Part III. C.

consequently vacated a jury verdict of $3,430,000. Second, the awarding of attorneys' fees is an exception to the traditional "American rule," "the underlying rationale [of which exception] is, of course, punitive . . . ." *Hall v. Cole*, 412 U.S. 1, 5 (1973). To the extent that at least some of the attorneys' fees awarded may not have been directly incurred as a result of Breezevale's bad faith litigation tactics, see Part III. B., the award of attorneys' fees in this case carries an added punitive element. Both of these sanctions, therefore, constitute significant punishment of Breezevale for its bad faith litigation tactics, and serve as an adequate deterrent to repetition of this behavior in the future. To impose an additional $1 million in punitive damages "lack[s] the reasonableness and proportionality required of a punitive damages award." *Daka, Inc. v. McCrae*, 839 A.2d 682, 697 (D.C. 2003).

IV. Conclusion

The use of known forged documents at the heart of civil litigation constitutes a serious threat to and abuse of the judicial process in fairly adjudicating private disputes. The trial court's dismissal of the suit and award of attorneys' fees and costs lay squarely within its sound discretion. We vacate only the separate award of punitive damages.[12]

So ordered.

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[12] The parties raise two additional arguments which can be resolved summarily. We affirm the trial court's denial of GDC's request for post judgment interest on the monetary sanctions, concluding that attorneys' fees and expenses in the circumstances here do not fall within the provisions of D.C. Code § 15-109 (2001) ("Interest on judgment for damages on contract or tort"). We further conclude that it was not an abuse of discretion for the trial court not to reconsider its denial of Breezevale's motion for disgorgement of fees paid by Breezevale prior to GDC's alleged malpractice. *See Remsen Partners, Ltd. v. Stephen A. Goldberg Co.*, 755 A.2d 412, 416 (D.C. 2000) ("There is no equitable reason for ordering disgorgement where plaintiffs have received the benefits they expected.").

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

[Filed April 10, 2003]

CA No. 94-10818
Judge Steffen W. Graae

BREEZEVALE LIMITED,

Plaintiff,

v.

TIMOTHY L. DICKINSON, ESQ., *et al.*,

Defendant.

MEMORANDUM OPINION, ORDER, AND JUDGMENT

The case has been remanded for this court to reconsider the sanctions and unpaid legal fees it assessed against Breezevale and to rule on Gibson Dunn's (GDC) motion for new trial consistent with the appellate court's partial reinstatement of the jury's verdict.[1] Both sides have filed extensive pleadings in support of various actions they ask the court to take.

Background

This case was originally tried to a jury in the fall of 1996. Despite concluding that Breezevale had forged key documents in the case, the jury found GDC liable for legal malpractice and gave judgment to Breezevale on its "case-within-a-case" breach-of-contract/fraud claims against Firestone Tire

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[1] The D.C. Court of Appeals first issued a panel decision, *Breezevale Ltd. v. Dickinson*, 759 A.2d 627 (D.C. 2000) (*Breezevale I*) which it subsequently vacated, 769 A.2d 133 (D.C. 2001) when the Court granted a petition for rehearing en banc. After rehearing *en banc*, the Court adopted and reaffirmed its earlier panel opinion. 783 A.2d 573 (D.C. 2001) (*Breezevale II*).

Corporation. Specifically, the jury awarded Breezevale $1.5 million on its 1988 claim, $730,000 on its 1989 claim, and $1.2 million on its Nigerian tire factory claim. The court set aside these verdicts for reasons stated in its 5/1/97 Memorandum Order on Defendants' Motion for Judgment and, Alternatively, New Trial. Simultaneously, the court entered judgment for GDC on its counterclaim (Memorandum Order on Defendant's Counterclaim, 5/1/97) and ultimately awarded GDC $4,061,353 in attorneys fees and costs attributable to Breezevale's bad faith litigation, $295,280 in fees and expenses due and owing for services rendered, and $1,000,000 in punitive damages. Memorandum Order of Judgment, 11/24/97.

The D.C. Court of Appeals disagreed with this court's rulings on proximate cause, contributory negligence, and insufficiency of the evidence, reinstating the jury's verdict on the 1988 and 1989 claims against Firestone, while affirming the court's judgment on the Nigerian tire factory claim. The appellate court also vacated the trial court's order of sanctions and its grant of a new trial, remanding both issues for further consideration. That is where matters stand today.

Breezevale's Request for a New Hearing

As a threshold matter, Breezevale asks that it be given a new hearing on sanctions, arguing that it never had an opportunity to defend itself. Specifically, Breezevale argues that it should now have a chance it was not given at trial to establish Mr. Habib's and Mr. Awit's good faith belief in the genuineness of the 1987 offer letters and related documents. As Mr. Habib asserts in his unsworn Declaration appended to this request: "I was not given an opportunity to testify as to the reasons why I thought the 1987 offer letters were genuine. . . . These offer letters were introduced into evidence, and while I was asked and testified that they were genuine, I was

not given a chance to explain why." In addition, Breezevale now proffers additional witnesses it would call to establish the genuineness of the questioned documents.

Breezevale's request does not bear scrutiny. If anything is clear about the trial of the case, it is this: both sides understood the core significance of the forgery issue and therefore litigated it fiercely with all stops removed. From Breezevale's point of view, establishing that the documents were genuine not only lay at the heart of its claim that GDC had committed legal malpractice, but also was central to its claim that it had been working on Firestone's behalf during 1987 and, thus, was entitled to damages for breach of contract.

Breezevale called handwriting and ink-dating experts in its unsuccessful efforts to validate the documents (but did not call Ms. Khoury who allegedly typed them or Mr. Jebbouri who allegedly hand-delivered them to Iraq in 1987). It presented questionable "documentation" from Iraq to support its claim that the offer letters were prepared and delivered to Iraq in 1987. It closely examined all of its witnesses about the preparation of the offer letters and spread sheets and, of course, vigorously cross-examined GDC's witnesses—notably Rebecca Paul—on the same points. Breezevale made the "genuiness" of the questioned documents front and center in the case, as, indeed, it told the jury in closing argument. For Breezevale now to proffer witnesses it could have called at trial and to claim it did not have a fair opportunity to litigate the central issue in the case verges on the disingenuous.

Given the exhaustive litigation of the forgery issue before the jury, there would have been no point in additional proceedings before the bench on the very same question. And there is no justification for it now. As Judge Frank Schwelb observed in his concurrence to the remand:

> In his 23-page opinion, the judge explicated, persuasively and in meticulous detail, why he, like the jury, credited Ms. Paul's account and disbelieved the denials

> by Breezevale's executives. I therefore believe that it is now unnecessary for the trial court to revisit this issue on remand. *Breezevale I*, 759 A.2d 627, 642 n.2 (D.C. 2000)

The court obviously agrees with Judge Schwelb's observation. Breezevale has had its bite of the apple. Its request to reopen is without merit.

The Scope of Potential Sanctions

The appellate court vacated the sanctions this court imposed because they appeared to be inextricably tied to its judgment that Breezevale's suit had no substantive merit. While the trial court does not necessarily agree with this characterization, it is obviously appropriate for the court now to reconsider sanctions in light of the appellate rulings and, in so doing, to address arguments by the parties which the court did not reach or consider before.

GDC has asked on remand, as it also did after trial, that the court dismiss Breezevale's suit as a sanction for its misconduct. Breezevale, in turn, argues that the appellate court precluded this very remedy when it declined "GDC's invitation that we now rule Breezevale to be barred as a matter of law from any recovery whatever against GDC." *Breezevale II*, 783 A.2d at 575. Breezevale reads too much into this language which merely concludes a discussion about the inapplicability here of the principle that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Hunter v. Wheate*, 53 App. D.C. 206, 208, 289 F. 604, 606 (1923). Indeed, the thrust of the appellate court's remand is that the trial court should exercise its discretion in accord with correct legal principles and fashion a sanction appropriate to the case. That sanction may include dismissal of Breezevale's suit, as the court emphasized:

> In fact, in *Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254 (D.C.) (*Synanon I*), *cert. denied*, 479 U.S.

> 816, 107, S. Ct. 69, 93 L. Ed.2d 26 (1986), we specifically rejected the plaintiff's argument that its suit could not be dismissed for bad faith conduct during discovery until judgment was rendered, stating that the civil rules do not "subsume or abrogate" the trial court's "inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Id.* at 1264 (citation omitted). It would not only contradict our previous decisions but ignore reality to suggest that only parties who have no valid claims whatsoever abuse the judicial process. The trial court has the inherent authority to police itself against those who would abuse its process, regardless of the substantive merits of their underlying claim.
>
> *Breezevale I*, 759 A.2d at 640.

In short, there is nothing in the *Breezevale I & II* decisions or in other governing case law which precludes or restricts the trial court from imposing whatever sanctions circumstances justify.

Breezevale has argued before and continues to do so now that the forgery issue was not material or central to its underlying case against Firestone or its malpractice suit against GDC. It therefore maintains that there are no grounds for a finding of bad faith litigation and, thus, no basis for imposing sanctions. These arguments simply do not square with reality.

It is indisputable that the collapse of Breezevale's original case against Firestone was the result of Rebecca Paul's disclosure that she had participated with Breezevale executives in forging documents that GDC turned over to Firestone in discovery. Breezevale's suit against GDC for malpractice rests on its claim that GDC mishandled Ms. Paul's disclosure and gave incompetent advice leading to a

highly disadvantageous settlement with Firestone. Breezevale has never deviated from its initial position that Rebecca Paul was lying and that the documents she said were forged are, in fact, genuine. Breezevale has always insisted that GDC should have deferred Ms. Paul's deposition in order to investigate her allegations and, had GDC done so, they would have concluded she was lying and none of the disasters that befell Breezevale would have occurred.[2] However, the evidence at trial conclusively established that the 1987 offer letters, spread sheets, and other related documents were forged with the full knowledge and participation of Breezevale's top executives.[3] In short, Breezevale built its malpractice suit against GDC on a foundation it knew to be fraudulent. Yet, to this day, Breezevale persists in arguing in the face of all the evidence that the documents at issue are genuine or, alternatively, are immaterial to its case, even if they were forged. Breezevale's position is insupportable.

The irony is that Breezevale had a strong case for legal malpractice against GDC, regardless of how the forgery issue played out. When Rebecca Paul told Millian and Stratton about forging documents, GDC found themselves in an obvious conflict situation which they resolved in the worst possible way. Instead of advising Ms. Paul that she should immediately hire her own lawyer, promptly telling Breezevale's executives of her disclosures, and then delaying her deposition, GDC set the denouement in motion by presenting Ms. Paul for deposition and, despite the client's request, refusing to withdraw her participation at a point where she still had not disclosed the fraud. Thus, at a crucial stage in Breezevale's litigation against Firestone, GDC lost sight of their professional obligations to their client and made

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[2] *See Paras.*, 24 and 34(f) of Breezevale's Complaint against GDC, filed 10/7/94.

[3] *See* the court's Memorandum Order on Defendant's Counterclaim, May 1, 1997.

decisions which narrowed Breezevale's choices to either an admission or a denial of wrongdoing. Postponing Ms. Paul's deposition would at least have bought time for GDC and Breezevale to consider their options and develop a strategy for dealing with the problem.

Ultimately, Breezevale would probably have faced the same stark choices.[4] One of them would have been to admit to the forgeries and then withdraw them as exhibits in the case.[5] The other was the choice Breezevale made: to assert that Ms. Paul was lying and that the documents are genuine. By perpetuating this falsehood and inextricably tying it to its malpractice claim against GDC, Breezevale tainted its lawsuit from the outset. It sought to portray itself as an innocent victim of GDC's incompetence, hoping thereby to add weight to its claim. Indeed, the pattern of behavior shown here is a repeat of its conduct in the underlying lawsuit against Firestone.

Sanctions Appropriate to This Case

The factual findings from which this court concluded that Breezevale framed its suit against GDC in bad faith were left undisturbed by the appellate court. The questions on remand

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[4] Based on the testimony of Peter Glenn, Firestone's lead counsel, the court is convinced that Firestone would have been on high alert if Paul's deposition had been postponed or stopped without explanation. Firestone would eventually have taken her deposition and the forgery allegations would have come out.

[5] Although it obviously would have been hard for Breezevale to prosecute its claims against Firestone under these circumstances, all was not necessarily lost. As the Court of Appeals took pains to point out, the jury here, in assessing Breezevale's claims against Firestone, apparently did not place much weight on its finding that Breezevale had forged documents. *Breezevale I*, 759 A.2d 634-35. A jury sitting in the U.S. District Court in Ohio hearing Breezevale's case against Firestone might similarly have minimized the significance of the forgeries, particularly if Breezevale had withdrawn them from its case.

are whether these findings justify the imposition of monetary sanctions in the amounts previously ordered and whether they call for the ultimate sanction of dismissal of Breezevale's complaint for perpetrating a fraud on the court.

Breezevale argues that "fraud on the court" cannot be found unless an officer of the court—i.e. an attorney—is implicated in the misconduct, citing Judge Aubrey Robinson's decision in *Lockwood v. Bowles*, 46 F.R.D. 625 (D.D.C. 1969). Since there is no evidence in the instant case that Breezevale's attorneys were malfeasant, it follows if Breezevale is right on the law that its case cannot be dismissed for "fraud on the court." However, this narrow position has given way in more recent decisions to a broader view that makes better sense: fraud on the court is fraud on the court whether it is perpetrated by a party, its counsel, or both.

Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989) stands for the proposition that dismissal may be appropriate where plaintiff, as distinguished from counsel, has perpetrated a fraud on the court. The essential facts of *Aoude* are as follows: In his effort to pressure Mobil to approve his acquisition of a second Mobil franchise, Mr. Aoude concocted, backdated, and persuaded the franchise holder (Monahan) to sign a bogus purchase agreement reflecting a purchase price nearly twice what he had actually paid for Monahan's interest. When Mobil refused to yield to this pressure, Aoude sued the company, giving his counsel the bogus agreement to attach as a centerpiece to his complaint. After extensive discovery, Mr. Monahan was eventually deposed and divulged the truth. Nearly three months after Aoude was confronted at deposition with Monahan's testimony, Aoude moved to amend his complaint by substituting the genuine agreement with Monahan for the fraudulent one. He also filed a second complaint, alleging essentially the same facts and prayers for relief, but this time abandoning his earlier reliance on the phony contract. Mobil moved to dismiss both actions

because of Aoude's fraudulent practices. The trial judge dismissed the cases and Aoude appealed.

The First Circuit affirmed. It held that a trial court "possesses the inherent power to deny the court's process to one who defiles the judicial system by committing a fraud on the court." *Aoude*, 892 F.2d at 1118. The Court defined "fraud on the court" as follows:

> A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. *Id.*

The Court found that Mr. Aoude's case was a "near-classic example" of a fraud on the court and, thus, was appropriate for dismissal.[6]

Breezevale's conduct in this case can be similarly characterized. Unchastened by the discovery of its attempted fraud on Firestone, Breezevale went to extraordinary lengths to promote its claim of innocence—both in the preparation of its case and in presentation of it to the court and jury. That Breezevale "sentiently set in motion some unconscionable scheme" is fully borne out by the facts surrounding preparation of the fraudulent documents themselves, as well as by

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[6] The Supreme Judicial Court of Massachusetts adopted the *Aoude*, court's definition of "fraud on the court" and upheld the trial court's dismissal in a case where plaintiff had forged a letter produced in discovery. *Rockdale Mgt. Co. Inc. v. Shawmut Bank N.A.*, 418 Mass. 596, 638 N.E. 2d. 29 (1994). *See Also Savino v. Florida Drive In Theater Mgt., Inc.*, 697 So.2d 1011 (1997) where the court, relying on a similar definition of "fraud on the court," affirmed dismissal of plaintiff's personal injury action because he had lied about having a masters degree and had lied to his physician about his educational background and above-average intelligence before the injury, so as to boost his damages claim.

the dubious attempts Mr. Abou Jaoude made in 1993, 1994, and 1995 to create essentially unverifiable documentary corroboration to support Breezevale's false claim that the 1987 offer letters were genuine. The court can only presume that these latter steps were taken in preparation for Breezevale's malpractice case against GDC.

It belabors the obvious to state that the entire Breezevale/GDC litigation, from first filings through discovery, motions practice, and trial was permeated by the forgery issue. The issue clearly interfered with "the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." GDC were forced to mount an enormous (but ultimately successful) attack on Breezevale's false claims of innocence; the jury had to sit through untold hours of complex testimony and argument to decide if Breezevale's documents were forged; and the trial judge then had to devote literally weeks of effort to comb through transcripts and records in order to address post-trial motions. For reasons Breezevale always knew but still refuses to acknowledge, the forgery issue should never have been made central to this case. By making it a major component of its malpractice suit against GDC, Breezevale perpetrated a fraud on the court which justifies dismissal of its action.

Synanon Foundation, Inc. v. Bernstein, 517 A.2d 28 (D.C. 1986) (*Synanon II*) is the leading case in this jurisdiction on the measure of damages for bad faith litigation. The trial judge had awarded counsel fees back to the date Synanon filed its complaint. The appellate court disagreed, concluding that the original complaint was not filed in bad faith, but that Synanon's misconduct began during discovery once litigation was underway. The case was remanded to the trial judge to make appropriate findings and to reduce the bad faith attorneys' fee award accordingly. But the appellate court did not deviate from the basic principle that "where a suit has

been filed in bad faith, the court has discretion to award the entire legal expenses incurred by the defendant." *Synanon II*, 517 A.2d at 38.[7]

As previously noted, this court's finding that Breezevale filed its action in bad faith remains the law of the case. There is no valid reason to revisit the question.[8] Similarly, the court's conclusion that Breezevale should pay GDC $4,061,353 in attorneys fees and costs for its bad faith litigation was reached after careful consideration of all of the evidence and, thus, need not be disturbed.[9] Finally, the court sees good reason for reinstating its $1 million punitive damages award against Breezevale, given Breezevale's persistent refusal to acknowledge its wrongdoing.

GDC's Fees for Services Performed in Firestone Litigation

In addition to their counterclaim for bad faith litigation, GDC asserted a separate counterclaim for moneys due and owing for services they rendered to Breezevale after Firestone's deposition of Rebecca Paul. The court awarded GDC $295,280.04 they claimed was owing. That award was vacated by the appellate court and Breezevale argues now, as it has before, that GDC should not prevail because the claim was not filed within the three year statute of limitations. D.C.

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[7] *See also General Fed'n of Women's Clubs v. Iron Gate*, 537 A.2d 1123, 1127-28 (D.C. 1988) and, most recently, *Fischer v. Flax*, Slip Op. No. 01CV-184, at 18-22 (D.C. 1/30/03).

[8] Breezevale argues that GDC has "unclean hands" and is therefore barred from claiming sanctions. It refers the court to a motion it filed on 9/12/97 asking the court to reverse its findings and reinstate the jury's verdict. Perhaps Breezevale has forgotten that the court considered and denied that motion by Memorandum Order dated 10/16/97 after concluding Breezevale's claim of bad faith on the part of GDC was meritless. In any event, the ruling was not appealed and Breezevale has no basis for raising the issue again.

[9] *See* Memorandum Order and Judgment, Nov. 24, 1997.

Code § 12-301(7).[10] Although the court ruled twice before against Breezevale on this point, it is appropriate to revisit the question again.[11]

The court is persuaded upon further analysis of Breezevale's argument and the case of *Sears Roebuck and Company v. Goudie*, 290 A.2d 826 (D.C. 1972) that GDC's claim on their unpaid bill is an affirmative cause of action unrelated to Breezevale's lawsuit and GDC's defenses thereto. Although GDC's counterclaim may be "compulsory," the statute of limitations is not tolled unless the claim is asserted as a defense to the complaint. Here it clearly is not. It must therefore be "tested apart from the primary claim in determining whether the statute of limitations would bar the counterclaim." *Id.* at 830. Breezevale filed its suit on October 7, 1994. GDC first asserted the counterclaim at issue in their Answer and Counterclaim on March 10, 1995. Breezevale points out that GDC were no longer working on the Firestone case by the end of 1991 and, thus, could have sent their final bill in early January of 1992, more than 3 years and 2 months before GDC filed their counterclaim. In short, Breezevale

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[10] *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Second Renewed Motion for Sanctions, pp. 45-48 (dated 1/2/02); Memorandum of Points and Authorities in Support of Plaintiff's Motion for Reconsideration of the Court's Order Denying Summary Judgment on Defendant's Counterclaim for Fees and Expenses in the Firestone Litigation (dated 8/13/96); Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, pp. 58-63 (dated 7/8/96).

[11] The court asked the parties to submit additional pleadings to assist the court in reconstructing the evidence relevant to GDC's counterclaim for fees and costs. The parties did so and the court thanks them for their assistance. Plaintiff submitted a Memorandum in Response to the Court's Order on the Firestone Fees (dated 12/16/02) and Defendants submitted a Presentation of Evidence Relating to their Counterclaim for Unpaid Legal Fees Pursuant to the Court's November 15, 2002 Order (dated 12/10/02).

argues that GDC waited too long to make their claim and should be barred from asserting it.

The court now agrees with Breezevale that GDC's counterclaim is subject to the three year statute of limitations. However, a question still to be answered is when GDC's cause of action accrued—in January 1992 when GDC could have sent a final bill or on April 3, 1992 when Breezevale unequivocally refused to pay?[12] Breezevale has argued that GDC billed in regular monthly or quarterly "installments" and that the next billing would have occurred (although, in fact, it did not occur) in early January 1992. A review of GDC's billing practices vis a vis Breezevale does not support Breezevale's position. The record shows that billings sometimes occurred monthly, every other month, or after three, four, or six months.[13] In short, there was no discernible pattern to GDC's billings and no particular reason that Breezevale would expect a bill in January 1992 as opposed to one on March 24, 1992 when GDC actually sent a statement (Def. Ex. 263) which Breezevale then refused to pay.

GDC counterargue that their cause of action for breach of contract did not arise until Breezevale refused to pay the bill. GDC may have had good reason to think Breezevale wasn't going to pay, and, arguably, could have billed earlier and thereby learned sooner that Breezevale was not going to pay. However, it is undisputed that no statement was submitted to Breezevale before March 24, 1992, and that it was shortly thereafter that Breezevale formally refused to make payment. Running the statute of limitations from the date of Breezevale's refusal to pay, it follows that GDC's counterclaim

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[12] In fairness to the parties, the court recognizes that its pre-trial rulings precluded the parties from developing in greater detail the evidence on these points.

[13] *See* Breezevale's own description of the billing intervals. Plaintiff's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, pp. 60-61 (July 8, 1996).

was timely filed. *Western Union Telegraph Co. v. Massman Construction Co.*, 402 A.2d 1275, 1277 (D.C. 1979) (the statute of limitations "begins to run when a contract is breached").

Resolution of the statute of limitations issue does not end the inquiry because Breezevale argues in the alternative that, as result of their breach of fiduciary duty, GDC should be ordered to disgorge all the fees they collected from Breezevale and should not be paid on their counterclaim. As for disgorgement, the court notes that Breezevale did not plead for this relief in its complaint, include it in the pretrial, or present a case on it at trial. After all the evidence was in, Breezevale asked to present the issue to the jury in the form of instructions and argument—a request the court denied as being much too late and without adequate notice to GDC. After the jury returned its verdict, Breezevale moved again for disgorgement, denied by Order dated May 1, 1997. Given its failure to appeal this order or any of the other rulings on the disgorgement issue, Breezevale is foreclosed from raising this matter again. However, the court does not see in the same light GDC's counterclaim for fees due and owing. The Court of Appeals vacated the court's $295,280.04 judgment and remanded the counterclaim for reconsideration. The issue is squarely before the court.

The threshold question is whether the jury's finding that GDC "breached the standard of care" equates to a breach of fiduciary duty. GDC argue that the jury was not asked to make a finding on breach of fiduciary duty and, in any event, the evidence does not support it. The court agrees with GDC's first point, but not the second. There can be little doubt that the jury's finding of professional negligence was based on GDC's mishandling of Rebecca Paul's disclosure of corporate misconduct and its aftermath. As Breezevale's ethics expert, Prof. Sherman Cohn, testified, GDC violated Rules 1.7 and 1.13 of the Rules of Professional Responsibility

when they (1) failed to disclose Paul's allegations to Breezevale executives, (2) presented her for deposition despite the obvious conflict with her employer and the potential criminal exposure of both, and (3) then refused the client's request to withdraw her from deposition before she disclosed her damaging information. GDC put themselves in a situation where they could not, and did not, act in Breezevale's interest, thereby breaching their fiduciary duty of loyalty. As the D.C. Court of Appeals ruled in *Griva v. Davison*, 637 A.2d 830 (D.C. 1994), "a violation of the Code of Professional Responsibility or the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client." *Id.* at 846-47. It, unquestionably did so here.

Breezevale argues in defense to GDC's counterclaim that GDC should not be paid for work they did after they breached their fiduciary duty. There is good authority for this proposition. In a case involving issues similar to ours, *Hendry v. Pelland*, 73 F.3rd 397, (D.C. Cir. 1996)[14], the United States Circuit Court of Appeals for the District of Columbia concluded that "under District of Columbia law, clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury." *Id.* at 402. The rationale is that "forfeiture reflects not the harm clients suffer from the tainted representation, but the decreased value of the representation itself." *Id.*

Local caselaw does not answer the question whether an attorney should forfeit all or part of his or her fees after a breach of fiduciary duty. The *Hendry* court, without stating a

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[14] Although *Hendry* deals primarily with a disgorgement claim and our case with a defense to a lawyer's claim for unpaid fees, the applicable principles are identical.

position, cites to cases where remedies ranged from forfeiture of all fees to forfeitures tailored to the facts and circumstances of a given case. It is clear from these cases that a fiduciary breach made intentionally or in bad faith would normally result in forfeiture of all fees, while a negligent breach could result in a lesser sanction. In one of the cited cases, *Gilchrist v. Perl*, 387 NW 2d 412 (Minn. 1986), the court, in fashioning a remedy, looked to one of its earlier decisions involving a breach of trust where they had considered (1) whether the breach was intentional, negligent, or without fault, (2) whether it related to part or all of the trust, and (3) whether the trustee's services had been of value to the trust. A similar approach seems reasonable in the instant case.

GDC's mishandling of Rebecca Paul's disclosures was a function of negligence and poor judgment, not intentional malfeasance. However, it effectively negated nearly two years of case preparation and so constrained Breezevale's choices at the end that Breezevale rationally could hope for little or nothing more than the $100,000 settlement it accepted from Firestone. The court is now persuaded that the value of GDC's representation was so diminished after the breach that it would be inequitable to make Breezevale pay for any part of it. Judgment will therefore be entered for Breezevale on GDC's counterclaim for fees and costs.

New Trial

The final issue for the court to reconsider is GDC's motion for a new trial. Having determined after the first trial that Breezevale had failed to present a prima facie case, the court logically concluded that the jury's verdict in Breezevale's favor necessarily was against the great weight of the evidence, justifying the grant of a new trial. By reinstating the jury's verdicts on Breezevale's 1988 and 1989 Iraq claims, the appellate court has instructed the trial court on remand to

determine after proper analysis whether these reinstated verdicts can withstand GDC's motion for new trial.

Unlike a motion for judgment which requires the court to consider the evidence in the light most favorable to a non-moving party, a motion for new trial requires consideration of all the evidence, both favorable and unfavorable. The court has discretion to set aside the jury's verdict, but only if it is against the "clear" or "great" weight of the evidence. *Lyons v. Barrazato*, 667 A.2d 314, 324 (D.C. 1995); *Richbow v. District of Columbia*, 600 A.2d 1063, 1066 (D.C. 1991).- In exercising that discretion, "the judge can, in effect, be the thirteenth juror, he may weigh evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict." *Fisher v. Best*, 661 A.2d 1095, 1099 (D.C. 1995) (internal quotation marks and citations omitted). However, the court is mindful that it cannot set aside a jury's verdict merely because it would have reached a different result had it been the trier of fact.

In reinstating the jury's verdict on the 1988 and 1989 Iraq claims, the appellate court held that there was sufficient evidence to support the jury's decision on both proximate causation and contributory negligence—i.e. that GDC's legal malpractice caused injury to Breezevale's case against Firestone and that Breezevale's forgeries did not play a substantial part in damaging its own case. While the jury's conclusions on these issues may find some support in the record, a review of all the evidence would suggest that the jury decided as it did despite the clear weight of evidence to the contrary.

The appellate court characterized Breezevale's bottom-line position with the jury to be that, absent GDC's malpractice, Breezevale could have proceeded to trial and ultimately prevailed against Firestone. *Breezevale I*, 759 A.2d at 634. To reach that conclusion, the jury would either have had to ignore the implications of its own finding that Breezevale

forged documents or somehow allow for the contradictory possibility that the documents were genuine. The fact remains that the jury found after a lengthy and complex trial that Breezevale had engaged in a forgery scheme—the same conclusion reached by the trial judge upon a higher standard of proof.

Assuming for the purpose of analysis that GDC had postponed Rebecca Paul's deposition and done so without giving Firestone a detailed explanation (i.e. had not committed malpractice), Firestone's counsel made it clear that their suspicions would have been aroused under these circumstances and they would have made certain to take her deposition. Given Breezevale's failure at trial to establish that the documents were genuine and Rebecca Paul was a liar, one can only presume that her deposition testimony after a postponement would have been consistent with what she actually said at deposition during the week of October 13, 1991 and later at the *de bene esse* video deposition presented for trial. In short, the evidence strongly suggests that Firestone would eventually have learned of Breezevale's fraudulent conduct and most probably would have done exactly as it did here: prepare a motion addressed to the U.S. District Court in Akron, Ohio' seeking dismissal of Breezevale's entire case and imposition of other sanctions for fraud. The outcome would likely have been the same, whether Ms. Paul testified at the October 13 deposition or later after an investigation of her allegations.

Alternatively, the appellate court suggests that the jury could have been relying on Professor Cohn who testified that if GDC had ultimately concluded after investigation that Rebecca Paul was telling the truth, they could ethically have advised Breezevale to withdraw the forged documents and amend any other relevant discovery. By not taking the time to conduct this investigation, GDC forced Breezevale into a "box" from which "a reasonable jury could conclude that

GDC's malpractice substantially crippled Breezevale's ability to get to trial." *Breezevale I*, 759 A.2d at 634 (D.C. 2000). While Prof. Cohn's scenario was a theoretical possibility, there is no evidence in the case to support it. Breezevale has never deviated from the initial position it took insisting that Paul was lying about the documents and there is no hint in the record that Breezevale would have accepted advice to withdraw the documents because they were fraudulent. A conclusion to the contrary would have been against the great weight of Breezevale's evidence, if not altogether speculative.

The contributory negligence issue is analyzed in much the same way as proximate causation. The court poses the question as the appellate court suggests: if GDC had exercised due care, would Ms. Paul's allegations have substantially affected Breezevale's prospects of proceeding to trial and ultimately prevailing? The jury's "no" answer to this question is hard to fathom in light of uncontradicted testimony by Firestone's counsel that he would never have foregone taking Paul's deposition and, thus, would have learned later the very same information he learned earlier. There is nothing to suggest Firestone would have used Paul's damaging information any differently if it had been disclosed at a rescheduled deposition. Given the actual outcome of the Breezevale/Firestone litigation and the evidence adduced at the Breezevale/GDC trial, the great weight of the evidence contradicts the jury's finding that Breezevale did not do substantial damage to its own case against Firestone.

As to the specifics of the 1988 and 1989 Iraq claims, the appellate court found that there was enough evidence in the record for the jury to find $1.5 million in damages on the 1988 claim and the existence of a contract between Breezevale and Firestone on the 1989 claim. The court will not revisit the 1988 claim as to damages, conceding that if the jury were to focus solely on Breezevale's theory that it was entitled to a 5% commission on the purported $30,000,000

FOCOEX/Iraq deal, there was enough evidence to support it. Although Breezevale virtually abandoned the commission theory and pressed other arguments with the jury, the court cannot conclude that the evidence was so clearly weighted in favor of a contrary result as to justify a grant of a new trial on this issue alone.

However, the court does not agree with the appellate court's conclusion that "there was some evidence, albeit weak, consistent with an exclusive distributorship agreement having existed in 1989." *Breezevale I*, 759 A.2d 636. Be that as it may, the court believes the analysis it made of the evidence on May 1, 1997 in connection with GDC's motion for judgment applies with equal force to a motion for new trial:

> As noted, Breezevale's last distributorship agreement with Firestone (Pl. Ex. 22) ended on November 30, 1988 and provided by its terms that it could not be renewed or extended by the parties (Pl. Ex. 22, ¶ 12.2) and that any relationship between the parties after its end "shall be the subject of a new agreement." (Pl. Ex. 22, ¶ 12.3) Attempts to negotiate a follow-on agreement failed. Breezevale was therefore in the difficult position of having to demonstrate by a course of dealing between Breezevale and Firestone that the terms set forth in the '86-'88 agreement did not mean what they said. In other words, Breezevale would have to show—as the Court permitted it to do—that Firestone treated Breezevale during 1989 as its exclusive distributor of tires to Iraq.
>
> Breezevale cites to internal Firestone documents from the first three months of 1989 wherein Breezevale is referred, to as Firestone's distributor. (Pl. Exs. 47, 48A, 53, 56, 58A, and 62). However, actual dealings between the parties are to the contrary. Firestone was working with FOCOEX on the 1989 tender (Pl. Ex. 59) and, in Breezevale's view, was being most uncooperative and unresponsive in providing meaningful quotes on Iraqi

> requests for sales offers. (Pl. Exs. 67, 70, 71A, and 76). This is so obviously a course of dealing from which one can only conclude that Firestone was not treating Breezevale as its exclusive distributor. Yet, Breezevale cites it as evidence for the existence of an exclusive contract while, at the same time, relying upon it as evidence of breach.[15]

In the court's view, the clear weight of the evidence establishes that Breezevale did not have an exclusive distributorship with Firestone in 1989.

All things considered, GDC are entitled to a new trial if dismissal of Breezevale's case is not sustained. However, given fully supported findings (1) that Breezevale forged the 1987 offer letters, spread sheets, and related documents, and (2) that GDC breached the standard of professional care in the way it handled Rebecca Paul's disclosure of Breezevale's fraudulent conduct, these two issues need not be tried again. Thus, a new trial would be confined to determining whether GDC's legal malpractice proximately caused damage to Breezevale's case against Firestone, whether Breezevale was contributorily negligent in substantially damaging its own case, and, as to the case-within-a-case, whether Breezevale had exclusive distributorship contracts with Firestone in 1988 and 1989 and what, if any, damages it suffered in those two years as result of contractual breaches and/or frauds by Firestone.

ORDER & JUDGMENT

Wherefore, upon reconsideration of the matters remanded to this court for decision, it is this 9th day of April, 2003

ORDERED that Breezevale's case against GDC is DISMISSED as a sanction for committing a fraud on the Court; it is further

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[15] Memorandum Order on Defendants' Motion for Judgment and, Alternatively, New Trial at 24-5 (May 1, 1997).

ORDERED, in the alternative, that GDC shall have a NEW TRIAL on Breezevale's 1988 and 1989 Iraq claims against Firestone, limited to the issues described in the first full paragraph on p. 28, *supra*; it is further

ORDERED that JUDGMENT be entered as follows:

(1) $2,970,210.00 in attorneys' fees and $1,091,143.00 in costs and expenses to GDC for Breezevale's bad faith litigation;

(2) $1,000,000.00 in punitive damages to GDC for Breezevale's bad faith litigation; and

(3) in Breezevale's favor on GDC's counterclaim for unpaid attorneys' fees and costs.

/s/ Steffen W. Graae
STEFFEN W. GRAAE
Associate Judge

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APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed October 18, 2001]

No. 97-CV-2076

BREEZEVALE LIMITED,

Appellant,

v.

TIMOTHY L. DICKINSON, *et al.*,

Appellees.

Appeal from the Superior Court of the District of Columbia

(Hon. Steffen W. Graae, Trial Judge)

(Argued En Banc April 19, 2001 Decided October 18, 2001)

ON REHEARING EN BANC

Before TERRY, STEADMAN,* SCHWELB, FARRELL, RUIZ, REID, and WASHINGTON, *Associate Judges*.*

STEADMAN, *Associate Judge*: Before us for en banc review is a legal malpractice action brought against the law firm of Gibson, Dunn & Crutcher LLP ("GDC")[1] by that firm's former client, Breezevale Limited ("Breezevale"). A jury found that GDC had mishandled a lawsuit filed by

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* Chief Judge Wagner and Judge Glickman have recused themselves from this case.

[1] More precisely, Breezevale brought suit against the partners of the firm, who are the actual appellees. For convenience, we refer to the firm as a collective singular appellee.

Breezevale against Bridgestone-Firestone, Inc. and Firestone Export Sales Corp. (collectively "Firestone"), resulting in $3,430,000 in damages. The damage award reflected the amount that Breezevale hypothetically would have won had its case against Firestone gone to a jury instead of settling due to GDC's alleged malpractice.

Citing evidentiary insufficiency, the trial court set aside the jury's verdict and entered judgment as a matter of law in favor of GDC. In the alternative, the court granted a new trial. Further, the trial court concluded that Breezevale had engaged in bad faith litigation and ordered it to pay GDC $5,356,633 in fees and costs, punitive damages, and unpaid legal fees. On initial appeal by Breezevale, a division of this court reversed the entry of judgment as a matter of law insofar as it relates to two of the three claims underlying the litigation, but affirmed the entry of judgment as to the third underlying claim. In addition, the division remanded the grant of a new trial for further consideration, and vacated without prejudice the order awarding sanctions for bad faith litigation and unpaid legal fees. *Breezevale Ltd. v. Dickinson*, 759 A.2d 627 (D.C. 2000).[2]

We granted GDC's petition for rehearing en banc primarily to consider its contention that, as a matter of law (or, more precisely, of policy), Breezevale should be absolutely barred from suit against its attorneys because the jury and later the trial judge (he by clear and convincing evidence) found that Breezevale, without GDC's knowledge, had forged documents in an attempt to bolster its underlying suit for breach of contract in which GDC had represented it. GDC bases its

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[2] Judge Schwelb joined the division opinion but wrote a concurring opinion expressing further views on the nature of the misconduct and the question of sanctions. 759 A.2d at 640-43. Judge Schwelb, joined now by Judge Terry, adheres to the views expressed in his concurring opinion when the case was before the division, especially with respect to GDC's "estoppel" argument. *Id.* at 642-43 n.3.

estoppel argument upon the principle that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Hunter v. Wheate*, 53 App. D.C. 206, 208, 289 Fed. 604, 606 (1923).

We have considered this argument carefully, but find ourselves unable to agree with the sweeping nature of an assertion that regardless of malpractice, a client who engages in wrongdoing in connection with any aspect of litigation thereby as a matter of law forfeits all rights of recovery against the attorney. Matters must be judged in relative context and with an eye to other available measures of compensation and sanction.

In *Hunter* itself, for example, the wrongdoing went to the very core of the entire situation. The plaintiff sought malpractice damages from a surgeon who, at her behest, performed a then-illegal abortion of her fetus. Just as the law will not enforce an unlawful contract, so the woman as the participant in the illegal transaction could not make it the basis of a tort recovery. Likewise in another case stressed by appellees, *Mettes v. Quinn*, 411 N.E.2d 549 (Ill. App. 1980), the plaintiff lost the advantage of a favorable settlement which resulted from her fraud and then tried to recover from her attorney because his allegedly faulty advice caused her fraud to be uncovered in such a way that she could no longer benefit therefrom. The acts of Breezevale here simply do not have that same degree of overall centrality to the damages, as illustrated by the significant verdict returned by a jury wholly informed of Breezevale's wrongdoing.

Further more, recognition must be made of the important role of trial court discretion that we have recognized in this entire area, including in the division opinion in the case now before us. *See also, e.g., Bredehoft v. Alexander*, 686 A.2d 586, 589 (D.C. 1996) (imposition of sanctions under inherent power reviewed for abuse of discretion, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)); *Chevalier v. Moon*,

576 A.2d 722, 724 (D.C. 1990) (discretionary review of trial court award of attorneys fees for bad faith and misrepresenting facts). Here, the trial court did not rely on the *Hunter* principle in entering judgment for GDC. Furthermore, for the reasons stated in the panel opinion, we are vacating the exercise of the trial court's sanction power in awarding compensation to GDC and remanding the case for further proceedings, including consideration of appropriate sanction actions to reflect Breezevale's conduct. We decline GDC's invitation that we now rule Breezevale to be barred as a matter of law from any recovery whatever against GDC. In all other respects, we leave the sanctions in the discretionary hands of the trial court upon remand.[3]

As has been our normal practice, the division opinion in this case was vacated when we granted the petition for rehearing en banc. 769 A.2d 133 (D.C. 2001). Neither party has persuaded us to depart from the division's disposition of the case.[4] Therefore, essentially for the reasons set forth in

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[3] Appellant repeats to us its complaint to the division about an insufficient evidentiary hearing on the issue of sanctions. Since that order has been vacated, it would be premature to prejudge whatever proceedings in this regard the trial court may decide to follow on remand. Also, appellant now suggests that if remanded the case should be assigned to a different judge. No such argument was ever made to the division and we need not address it for the first time on a "rehearing" *en banc*. In any event, we discern no substantive merit in Breezevale's belated suggestion.

[4] GDC particularly disputes, for essentially two reasons, the conclusion that the jury could find proximate cause. First, it asserts that Breezevale presented no evidence from which the jury reasonably could infer that its executives would have accepted the advice to withdraw the documents and interrogatory answers, because that would have impliedly admitted the forgery which they consistently denied. But the action need not have been so viewed. The jury reasonably could have found that an informed Breezevale might well have perceived the immateriality of the alleged forgeries to the strength of its case against Firestone—something the malpractice jury later confirmed—and had other options besides effectively conceding the expected motion to dismiss as Breezevale did by accepting

the division's opinion, we adopt and reaffirm the appellate rulings as ordered in the final paragraph of that opinion. 759 A.2d at 640.

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a grossly reduced settlement offer. That in essence was an implication of the testimony of Breezevale's expert, and the jury could have found it persuasive. Second, GDC argues that Breezevale adduced no testimony that it could have survived a dismissal motion before the Ohio trial even if adequately represented. The suggestion is that Breezevale was obliged to present expert testimony, which it did not, tending to disprove the likelihood that the Ohio judge would have imposed sanctions terminating or greatly weakening its case, wholly or in part. We do not think Breezevale's burden of proving causation went so far. Breezevale showed, by legally sufficient evidence, that GDC's malpractice left it with no practical choice but to accept GDC's advice to settle. The relative likelihood that dismissal could not have been averted anyway was, in our judgment, a matter for GDC to establish, if it chose to, as part of its defense.

APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-CV-2076

BREEZEVALE LIMITED,
Appellant,

v.

TIMOTHY L. DICKINSON, *et al.*,
Appellees.

Appeal from the Superior Court of the
District of Columbia
(Hon. Steffen W. Graae, Trial Judge)

(Argued September 30, 1999 Decided September 21, 2000)

Before STEADMAN, SCHWELB and RUIZ, *Associate Judges.*

Opinion for the court by *Associate Judge* STEADMAN.

Concurring opinion by *Associate Judge* SCHWELB at p. __.

STEADMAN, *Associate Judge*: Breezevale Limited ("Breezevale") is a former client of the law firm of Gibson, Dunn & Crutcher LLP ("GDC"). In a legal malpractice action against GDC,[1] a jury found that GDC had mishandled a lawsuit filed by Breezevale against Bridgestone-Firestone, Inc. and Firestone Export Sales Corp. (collectively "Firestone"), resulting in $3,430,000 in damages. The damage award reflected the amount that Breezevale hypothetically would have won had its

[1] More precisely, Breezevale brought suit against the partners of the firm, who are the actual appellees. For convenience, we refer to the firm as a collective singular appellee.

case against Firestone gone to a jury instead of settling due to GDC's alleged malpractice.

Citing evidentiary insufficiency, the trial court set aside the jury's verdict and entered judgment as a matter of law in favor of GDC. In the alternative, the court granted a new trial. Further, the trial court concluded that Breezevale had engaged in bad faith litigation and ordered it to pay GDC $5,356,633 in fees and costs, punitive damages, and unpaid legal fees. We reverse the entry of judgment as a matter of law insofar as it relates to two of the three claims underlying the litigation, but affirm the entry of judgment as to the third underlying claim. We remand the grant of a new trial for further consideration. We vacate without prejudice the order awarding sanctions for bad faith litigation and unpaid legal fees.

FACTUAL SUMMARY[2]

Phase One: Breezevale v. Firestone

In October 1989, Breezevale hired GDC to investigate and pursue several potential claims against Firestone arising from business dealings involving Iraq and Nigeria. In 1990, on GDC's advice, Breezevale brought suit in the United States District Court for the Northern District of Ohio,[3] seeking damages of approximately $20,000,000. Its first two sets of claims alleged that Firestone had committed breach of contract and fraud in its sale of tires to Iraq in 1988 and 1989 while it had an exclusive distributorship agreement with Breezevale ("1988 Iraq claim" and "1989 Iraq claim" respec-

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[2] Although numerous factual aspects in this extensive record covering two major lawsuits were in hot dispute, we present this highly truncated summary of the proceedings, as we must in reviewing a grant of judgment as a matter of law, in the light most favorable to Breezevale. *See Homan v. Goyal*, 711 A.2d 812, 817 (D.C. 1998).

[3] Breezevale originally brought suit in the United States District Court for the District of New Jersey, but the case was transferred to Ohio.

tively). Its third claim alleged that Firestone had breached a promise to develop a manufacturing plant in Nigeria with Breezevale ("Nigeria claim"). There is no dispute that Ohio law governed the action.

Discovery began in preparation for trial. At some point in mid-1991, Firestone offered to settle the case by paying Breezevale $3,500,000 and entering into a five-year distribution agreement for Nigeria, but Breezevale rejected the offer on GDC's advice. Discovery continued accordingly, including the scheduling of a particular Breezevale employee for deposition on October 14, 1991. On the night of October 13, however, a legal bomb dropped when that employee revealed to a GDC associate attorney that she planned to testify during her deposition that she had personally forged certain documents produced to Firestone, specifically offer letters dated late 1987 pertaining to the sale of tires to Iraq, at the direction of and with the participation of a certain Breezevale executive.

The following morning, just before the deposition, the GDC associate took the Breezevale employee to the office of a GDC partner to discuss the situation and ask how to proceed. The partner decided that the deposition should go forward without immediately notifying Breezevale, even though someone from Breezevale actually phoned during the meeting. However, after uneventful morning testimony, the partner and the associate did go to Breezevale's offices during the lunch break and advise a different Breezevale executive of the impending testimony. The executive immediately asserted that the employee was lying and asked the partner to delay the deposition until GDC could investigate the alleGAtions. The partner refused, and the employee proceeded to give her damaging testimony that afternoon. On a subsequent day, she also retrieved from her home certain "corroborating evidence" of the forgeries. This evidence was made part of the deposition record.

Firestone's attorneys immediately began drafting a motion to dismiss all of Breezevale's claims with prejudice as a sanction for fraud and misconduct. Upon threat of imminent fining of the motion, and with GDC's advice, Breezevale settled with Firestone for $100,000.

Phase Two: Breezevale v. GDC

In October 1994, Breezevale filed suit against GDC in the District of Columbia Superior Court for legal malpractice in its handling of the Firestone litigation. Breezevale basically contended that GDC had abandoned its client upon learning of the impending damaging deposition testimony, even though adequate investigation would have revealed that the employee was lying. According to Breezevale, GDC thus violated the legal standard of care and irreparably damaged Breezevale's suit against Firestone. Breezevale initially argued both that GDC's malpractice prevented a better settlement and that it prevented Breezevale from prevailing at trial. However, the trial court ultimately ruled that the "better settlement theory" was too speculative and instructed the jury only on the "trial theory." [4]

Under the "trial theory," Breezevale sought damages in the amount it would have hypothetically been awarded had its case against Firestone gone to trial in Ohio. Thus, the actual jury in the malpractice case against GDC also acted as a "hypothetical jury" hearing the Ohio case against Firestone. *See Thomas v. Bethea*, 718 A.2d 1187, 1197 (Md. 1998) ("this is the accepted and traditional means of resolving the issues involved in the underlying proceeding in a legal malpractice action' and 'avoids speculation by requiring the plaintiff to bear that burden of producing evidence that would have been required in the underlying action') (quoting RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRAC-

[4] Breezevale does not appeal this ruling.

TICE § 14.3, at 237-38 (4th ed. 1996 and Supp.1998)); *see also Niosi v. Aiello*, 69 A.2d 57, 60 (1949).

Both sides presented expert testimony on the legal standard of care. Although both experts agreed that the employee's deposition would have eventually gone forward, Breezevale's expert testified that GDC breached the standard of care by (1) failing to inform Breezevale promptly of the employee's expected testimony; (2) failing to advise the employee immediately that GDC could no longer act as her attorney since she now had a conflict of interest with Breezevale and that she should obtain separate counsel; (3) failing to postpone the deposition so that GDC could (a) recommend settlement immediately, (b) investigate and be prepared to discredit the employee at the eventual deposition, and/or (c) investigate and recommend withdrawal of any forged documents and amendment of any related interrogatories; and (4) advising Breezevale to settle without first informing it that GDC had developed a personal conflict of interest to the extent it was worried about its own liability as a conduit of the documents.

After seven weeks of trial, the jury awarded Breezevale $3,430,000 by way of a special verdict form. Specifically, the jury found that GDC had breached the standard of care in its representation of Breezevale and thereby proximately caused damage to Breezevale's case against Firestone. The jury further found that forgeries did occur with the participation of "one or more Breezevale executives," but that such forgeries did not "play[] a substantial part in damaging" Breezevale's lawsuit against Firestone and that Breezevale still would have won $1,500,000 on its 1988 Iraq claim for breach of contract and fraud, $730,000 on its 1989 Iraq claim for breach of contract (but not fraud), and $1,200,000 on its Nigeria claim based on promissory estoppel.

Notwithstanding the verdict, the trial court entered judgment as a matter of law in favor of GDC. It based its decision on three grounds. First, in light of the factual finding of forgery, the court found no evidence to support the jury's conclusion that GDC's malpractice proximately caused Breezevale's loss. The court reasoned that delaying the deposition would only have postponed subsequent events, not avoided them. Second, in light of the finding of forgery, the court concluded that Breezevale's own actions had proximately caused their losses and that Breezevale was therefore necessarily contributorily negligent. Third, the court found no evidence to support the jury's findings on damages. In the alternative, in a single sentence, the court granted a new trial on the ground that the verdict was against the clear weight of the evidence.

Just when Breezevale may have thought things could get no worse, they did. After trial and its ruling granting judgment as a matter of law, the court considered GDC's "equitable counterclaim" for bad faith litigation from the bench. Consistent with the jury's factual finding of forgery by a preponderance of the evidence, *see Lewis v. Sears Roebuck & Co.*, 845 F.2d 624, 629-30 (6th Cir. 1988) (stating that trial court considering equitable claim with common factual issue as legal claim decided by jury should not make contrary or inconsistent finding), the trial court found by clear and convincing evidence that forgery had occurred with the participation of one or more Breezevale executives. Concluding that it was "difficult to imagine a clearer case of bad faith litigation," the court ordered Breezevale to pay GDC a total of $5,356,633, including $4,061,353 for GDC's fees and costs in litigating the malpractice action, $1,000,000 in punitive damages, and $295,280 in unpaid legal fees from the original Firestone litigation.

ANALYSIS

I. Judgment As A Matter of Law

For the trial court to grant judgment as a matter of law, there must exist no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. See Super. Ct. Civ. R. 50. As we have often said:

> [I]t is only in the unusual case, in which only one conclusion could reasonably be drawn from the evidence, that the court may properly grant judgment notwithstanding the verdict. Moreover, it is the responsibility of the jury (and not the judge) to weigh the evidence and to pass upon the credibility of the witnesses. If impartial triers of fact could reasonably find the plaintiff's evidence sufficient, the case may not be taken from the jury.

Homan, supra, 711 A.2d at 817-18 (citations omitted).[5] "In reviewing a motion for judgment as a matter of law after a jury verdict, this court applies the same standard as the trial court." *Durphy v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.*, 698 A.2d 459, 465 (D.C. 1997). These considerations guide our review of the trial court's action here.

A. Proximate Cause

To establish proximate cause, Breezevale had to show by a preponderance of the evidence that GDC's negligence

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[5] In *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, 1103 (D.C.1986) we stated that judgment as a matter of law is only appropriate in "extreme cases." But by that phrase we were only recognizing that grants of such judgments are unusual under the required standard. Where the standard is met and there is no legally sufficient evidence, it is the duty of the trial court to enter judgment as a matter of law. *See W.M. Schlosser Co., Inc. v. Maryland Drywall Co., Inc.*, 673 A.2d 647, 650-51 (D.C. 1996) (stating that this court is "obliged to reverse" the trial court's denial of a motion for judgment as a matter of law if no reasonable jury could have reached the verdict reached on the evidence presented).

"caused a legally cognizable injury." *See Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C. 1985). "Although it is sufficient to show that the movant could have 'fared better' in reaching the ultimate goal sought, or that there would have been a difference in the trial's outcome, more is required than speculation." *Id.* (citations omitted). "The issue of proximate cause is usually a question of fact for the jury to decide. Only if there are absolutely no facts or circumstances from which a jury could reasonably find that the defendant was negligent, and that such negligence was the proximate cause of injury, would the matter be a question of law for the court." *Bragg v. Owens-Corning Fiberglas, Corp.*, 734 A.2d 643, 648 (D.C. 1999) (citations omitted).

Breezevale's bottom-line position, as it went to the jury, was that absent GDC's malpractice, Breezevale could have proceeded to trial and ultimately prevailed. Looking at the record in the light most favorable to Breezevale, we cannot agree with the trial court that there was no evidence from which a reasonable jury could find support for that theory. The trial court may well be correct that GDC could not have found exculpatory evidence during an investigation, that the employee would have eventually testified, and that Firestone would have taken the same position as it did. However, the trial court's conclusion that these developments would have caused the "inevitable destruction" of Breezevale's case against Firestone does not necessarily follow. The jury's verdict here indicates the contrary.

Breezevale's expert testified that GDC violated the standard of care at several points leading up to and including the refusal to postpone the deposition. He also testified that, had GDC ultimately discovered that the employee's allegations were in fact true, GDC could have ethically advised Breezevale to withdraw the relevant documents and amend any related interrogatories. In his opinion, GDC's actions forced Breezevale into a "box" by the time of the $100,000

settlement offer. A reasonable jury could conclude from this testimony that GDC's malpractice substantially crippled Breezevale's ability to get to trial. Although the thrust of Breezevale's argument at trial was that GDC would have discovered during a hypothetical investigation that the employee was lying, not that they would have discovered she was telling the truth and recommended withdrawal of the documents and amendment of the interrogatories, the jury's verdict must, if possible, be reconciled with the totality of the evidence presented to it.[6] This jury knew of Breezevale's fraud and concluded that Breezevale nonetheless would have prevailed at trial. We do not think this conclusion was without any support. *See infra* notes 9 and 11. *Cf. Washington Welfare Ass'n v. Poindexter*, 479 A.2d 313, 315 (D.C. 1984) ("when there is some evidence from which jurors could find the necessary elements, . . . or when the case turns on disputed facts and witness credibility[,] . . . the case is for the jury") (internal quotation marks and citation omitted).

B. Contributory Negligence

"To assert the defense of contributory negligence, a party must establish, by a preponderance of the evidence, that the plaintiff failed to exercise reasonable care, and that this failure was a substantial factor in causing the alleged damage or injury." *Massengale v. Pitts*, 737 A.2d 1029, 1031 (D.C. 1999) (internal quotation marks and citation omitted). Contributory negligence is a complete bar to recovery. *See id.* at 1031-32; *see also Dunphy, supra*, 698 A.2d at 467 (in medical malpractice context, "contributory negligence is a valid defense if the patient's negligent act concurs with that of the physician and creates an unreasonable risk of improper medical treatment" but not if "the patient's negligent act

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[6] The verdict form itself recognized that damages might be awarded even if Breezevale was found to have forged the documents.

merely precedes that of the physician and provides the occasion for medical treatment").

In this case, the trial court found "no question on this record that the take-it-or-leave-it $100,000 settlement offer Firestone finally made was a direct result of the forged documents. Thus, no reasonable juror could have failed to conclude Breezevale was contributorily negligent." It seems to us that this poses somewhat the wrong question. The issue is not whether the employee's allegations were a substantial factor in Firestone's decision to make a particular settlement offer. The issue is whether, if GDC had exercised due care, the employee's allegations would have substantially affected Breezevale's prospects of proceeding to trial and ultimately prevailing. The jury answered this question in the negative, finding that the forgeries[7] did not "play[] a substantial part" in damaging Breezevale's lawsuit against Firestone. In fact, the trial court itself acknowledged in its order that there was sufficient, albeit weak, evidence to support the jury's finding that a contract existed between Breezevale and Firestone in

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[7] The jury was instructed to decide whether forgery occurred by a "preponderance of the evidence," the standard for proving fraud in an action for money damages under Ohio law. *See Household Finance Corp. v. Altenberg*, 214 N.E.2d 667 (Ohio 1966). On appeal Breezevale argues the jury should have been instructed under District law. Assuming arguendo that this is true, the result is the same. "A party asserting the defense of contributory negligence is required to establish, by a preponderance of the evidence, that the plaintiff failed to exercise reasonable care." *Poyner v. Loftus*, 694 A.2d 69, 71 (D.C. 1997). Our rule that "fraud" must be proven by "clear and convincing evidence," *see Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 861 (D.C. 1999), is inapplicable here since GDC does not claim o defend that Breezevale defrauded them, but rather asserts that, even if their own conduct fell below the applicable standard of care, so did Breezevale's. The fact that Breezevale's conduct allegedly included deceitful ("fraudulent") acts does not raise the standard of proof. *Cf. Shea v. Fridley*, 123 A.2d 358, 363 (D.C. 1956) (discussing third party complainant's burden of proving by a preponderance that landlord failed to exercise necessary care due to gross negligence, willful conduct, or fraud).

1988. This was the only claim to which the forged offer letters arguably related. Since there was some evidence to support the jury's verdict, *see Poindexter, supra*, 479 A.2d at 315, judgment as a matter of law was inappropriate.[8]

C. Proof of Damages

To recover damages in its suit against GDC, Breezevale had to establish the amount it hypothetically would have won (taking into account the forgery issue) from a federal court jury in Ohio had its case against Firestone gone to trial. Under District law, which governed the malpractice suit, "a plaintiff is not required to prove the amount of his damages precisely; however, the fact of damage and a reasonable estimate must be established." *Bedell v. Inver Housing, Inc.*, 506 A.2d 202, 205 (D.C. 1986) (citation omitted).

The trial court here concluded that Breezevale had not sufficiently established damages on any of its three claims against Firestone under Ohio law and therefore, necessarily, had failed to establish any damages against GDC under District law. In reviewing this alternative basis for the judgment, we keep in mind that under Ohio law, much as under our own, "[w]hen reviewing a damages award, an appellate court must not reweigh the evidence, and may not disturb an award of damages unless it lacks support from any competent, credible evidence," *Srail v. RJF Intl Corp.*, 711 N.E.2d 264, 273 (Ohio App.), *appeal not allowed*, 696 N.E.2d 602 (Ohio 1998). We will consider each of the underlying claims against Firestone in turn.

1. 1988 Iraq Claim. Under Ohio law, "in order for a plaintiff to recover lost profits in a breach of contract action the

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[8] We cannot agree with GDC that our disposition effectively rewards Breezevale for "duping" the jury. The jury specifically found that forgery did occur, despite Breezevale's steadfast representations to the contrary, so it is difficult to see how the jury was "duped."

amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty." *Gahanna v. Eastgate Properties, Inc.*, 521 N.E.2d 814, 818 (Ohio 1988). As to the amount of damages, a reasonable certainty "has been defined as 'that degree of certainty of which the nature of the case admits.' *Bemmes v. Public Employees. Retirement System of Ohio*, 658 N.E.2d 31, 36 (Ohio App. 1995) (quoting 22 AM. JUR. 2D *Damages* § 25 (1988 & Supp.1995)); *cf. Endersby v. Schneppe*, 596 N.E.2d 1081, 1084 (Ohio App. 1991) (lost profit award should be "substantiated by calculations based on facts available or in evidence").

The trial court concluded that Breezevale failed to adequately establish the amount of damages on its 1988 Iraq claims. Breezevale contends that the jury's award of $1,500,000 permissibly represented a 5% commission on $30,000,000 in Firestone tire sales made to Iraq in 1988 through another distributor, FOCOEX. Viewed in the light most favorable to Breezevale, some evidence was before the jury to support both those figures.[9] Although GDC asserts

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[9] Evidence supporting the 5% figure included: (1) a Firestone fax sheet, dated September 23, 1987, approving certain tire exports to Syria and Iraq on the condition that "[s]hipments to Iraq subject to 5 pct commission for our distributor Breezevale"; (2) a Firestone fax sheet, dated June 7, 1988, discussing a possible one-time export of tires to Iraq by Firestone's Kuwaiti distributor at prices including "5% over FOB for Breezevale"; and (3) testimony by a Breezevale director that Breezevale received a 5% commission when Firestone sold tires to Iraq without going through Breezevale. Evidence supporting a commission in general included: (1) a Firestone fax sheet, dated February 8, 1988, recommending that Firestone "reserve a commission for Breezevale" in a deal involving the sale of Spanish tires to Iraq where "middlemen not allowed"; (2) a Firestone fax sheet, dated June 9, 1988, pertaining to a "San Diego dealer" and stating, "Advise we can quote reserving a commission for Breezevale."; (3) a letter on Firestone letterhead, dated July 14, 1988, indicating that "[o]n previous occasions payments of commissions has been discussed with Breezevale," that 1% of the FOB value of a certain deal was paid to Breezevale in 1985 for its services, and that a fixed fee equivalent to less

that a "commission" theory was never expressly argued to the jury, again, in reviewing a grant of judgment as a matter of law, we must attempt to reconcile the jury's verdict with the evidence offered. *See Poindexter, supra*, 479 A.2d at 315.

2. 1989 Iraq claim. As to this claim, the trial court concluded that there was no evidence that an exclusive distributorship agreement even existed between Breezevale and Firestone in 1989.[10] Under Ohio law, "[p]arties may orally or by informal memoranda, or by both, agree upon all essential terms of [a] contract and effectively bind themselves, if that is their intention, even though they contemplate the execution, at a later time, of a formal document to memorialize their undertaking." *Arnold Palmer Golf Co. v. Fuqua Industries, Inc.*, 541 F.2d 584, 589 n.3 (6th Cir. 1976). Whether a contract existed is a question of fact to be resolved by the finder of fact. *See Cork v. Bray*, 555 N.E.2d 936, 940 (Ohio 1990). In this case, viewing the evidence in the light most favorable to Breezevale, there was some evidence, albeit weak, con-

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than 1/2% of the total FOB value was appropriate in the instant situation; and (4) a Firestone fax sheet, dated September 17, 1988, referring to a "recent request" and stating, "We advise that Breezevale Ltd. are our non-exclusive distributors . . . . We recommend that we sell thru them or reserve a commission for them. We must prior discuss same with them."

Evidence supporting the $30,000,000 figure included: (1) a Firestone fax sheet, dated March 16, 1989, stating that FOCOEX is "making substantial profits as their sales price appears to be in excess of US dollar 30 million"; and (2) the July 14, 1998 letter discussed *supra*, indicating that payment of a $125,000 fixed fee to Breezevale would represent "less than 1/2% of the total FOB value" of an agreement between Firestone and FOCOEX of Spain (which calculates to $25,000,000).

[10] The trial court did not address the *amount* of damages on the 1989 Iraq claim, and neither party significantly addresses this issue in their briefs, so we limit our review to whether there was sufficient evidence of a contract to survive judgment as a matter of law.

sistent with an exclusive distributorship agreement having existed in 1989.[11] *See Poindexter, supra*, 479 A.2d at 315.

3. Nigeria Claim. The damages on the Nigeria claim present another question. Unlike the Iraq claims for lost profits, on this claim Breezevale sought only reimbursement for actual expenditures made in reliance on Firestone's promise. While one might expect the amount of such damages to be more easily proved, the only evidence Breezevale in fact offered on this issue was the following testimony by a Breezevale executive:

> Q. Now did you—did Breezevale spend any money in connection with the efforts to construct a plant, tire plant in Nigeria?
>
> A. Yes, sir.

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[11] Breezevale cites several documents as evidence of an exclusive distributorship, including: (1) a Firestone fax sheet, dated January 31, 1989, stating, "Since Breezevale Ltd. are our distributors we advise that all quotations should be channelled thru them."; (2) a Firestone document, dated February 3, 1989, thanking a company for its inquiry and stating, "We nevertheless regret to tell we cannot quote directly to you, as we are represented in Irak by 'Breezevale Ltd'"; (3) a Firestone fax sheet, dated February 14, 1989, stating, "We further were advised by Breezevale that you promised to advise FOCOEX . . . that Breezevale Ltd. are our distributors for Iraq."; (4) a Firestone fax sheet, dated February 22, 1989, asking "how you propose to advise or have advised FOCOEX that Breezevale is our distributor for Iraq within the framework of the new 1989 tender for Iraq"; (5) a-Firestone fax sheet, dated March 13, 1989, referring to a meeting with FOCOEX and Breezevale and stating that "there is no reason that Breezevale cannot handle this export business"; and (6) a Firestone fax sheet, dated March 16, 1989, stating, "Breezevale will again fax you Iraq requirements for delivery starting September 1989 which as you have stated is the month that current shipments will have been finalized under the current contract."

Q. Approximately how much money did Breezevale spend in connection with that tire plant project?

A. About one million 200,000 dollars.

Without challenging the jury's obvious crediting of this testimony, evinced by its eventual $1,200,000 award of damages related to this claim, the trial court concluded that the executive's testimony was insufficient to create the "reasonable certainty" as to damages required by Ohio law because, "[a]bsent some independent corroboration, there would be no way for a jury to determine if [the executive's] conclusory assertion [was] based on fact."[12]

Under Ohio law, conclusory testimony proffered by a business owner is insufficient to establish lostprofits. *See Endersby, supra*, 596 N.E.2d at 1084 (finding award of lost profits "uncertain and purely speculative" where only evidence was business owner's testimony as to expected profits, which was "phrased generally and [did] not provide a necessary basis for calculation of either actual or anticipated but unrealized profit"). Although Breezevale sought to recover actual expenditures rather an lost profits in its Nigeria claim, Breezevale does not identify, and we have not found, any case under Ohio law establishing a more lenient standard for proving actualdamages than lost profits.[13] Indeed, under

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[12] Breezevale points out that, in describing GDC's handling of the Firestone litigation, a GDC partner also testified that "Breezevale had spent a bunch of money." However, in addition to going more to the fact of damages than their amount, such testimony by Breezevale's former attorney would obviously not have been heard by a hypothetical Ohio jury.

[13] Although neither party cites it, in an unpublished opinion last year, the Ohio Court of Appeals did allow the use of conclusory testimony by a business owner to establish her past earnings for purposes of calculating future lost wages from personal injury. *See Smith v. Lima Mem. Hosp.*, 1999 Ohio App. LEXIS 2367, *appeal not allowed*, 716 N.E.2d 1170 (Ohio 1999). However, the court expressly stated that "the best proof available under the facts should be required" to prove damages, *see id.* at

our own law, such evidence would be insufficient to establish actual damages. *See Bedell, supra*, 506 A.2d at 202 (affirming award of $1000 nominal damages to art gallery owner who claimed $78,500 worth of water damage to artwork, where only proof of damages was "a list prepared by appellant of damaged items and their undocumented dollar values," which "provided an inadequate basis for developing a reasonable estimate of appellant's losses" under District law). Thus, the trial court properly concluded that Breezevale failed to establish damages on its Nigeria claim. Accordingly, we affirm the entry of judgment as a matter of law to the extent it pertains to this claim.

II. New Trial

"In contrast to a motion for judgment notwithstanding the verdict, which requires the court to consider the evidence in the light most favorable to the non-moving party, a motion for new trial requires consideration of all the evidence, both favorable and unfavorable." *Lyons v. Barrazotto*, 667 A.2d 314, 324 (D.C. 1995) (citation omitted); *see also Fisher v. Best*, 661 A.2d 1095, 1098 (D.C. 1995) ("ordering a new trial is quite different from entering judgment notwithstanding the verdict"). Since the trial court, unlike the appellate court, has had the benefit of seeing and hearing the trial first hand, a "ruling on a motion for new trial is committed to the sound discretion of the trial court and will be reversed on appeal only if that discretion has been abused." *Oxendine, supra*, 506 A.2d at 1110; *see also District of Columbia v. Murtaugh*, 728

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*5; *cf. Bemmes, supra*, 658 N.E.2d at 36 ("reasonable certainty . . . has been defined as 'that degree of certainty of which the nature of the case admits') (citation omitted), and specifically concluded that Smith's memory was "the best available evidence" of her past earnings on the facts of that case, *id.* at *6. In contrast, there is no reason to believe in the instant case that the executive's testimony was "the best available evidence" of the expenditures of an established international company on a major project, at least absent some explanation for the lack of documentation.

A.2d 1237, 1241 (D.C. 1999) ("trial court has broad latitude in passing on a motion for new trial") (citation omitted). "The trial judge's latitude in passing upon a motion for a new trial is greater than that accorded to an appellate court." *Fisher, supra*, 661 A.2d at 1098.

At the same time, however, the trial court may not set aside a jury verdict merely because it would have reached a different result had it acted as the trier of fact. *See Lyons, supra*, 667 A.2d at 325; *Durphy, supra*, 698 A.2d at 469. "In reviewing an order granting a new trial, this court scrutinizes more strictly orders predicated upon a reweighing of the evidence in order to protect the litigants' right to jury trial. Such motions should be granted only if the verdict is against the great—not merely the greater—weight of the evidence." *Lyons, supra*, 667 A.2d at 328-29 (internal quotation marks and citations omitted). If the verdict is against the great (or "clear"[14]) weight of the evidence then, even though there may be sufficient evidence that precludes entry of a directed verdict or judgment notwithstanding the verdict, the exercise of the trial court's discretion to set aside the verdict and order a new trial is "not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Fisher, supra*, 661 A.2d at 1098.

In this case, the trial court focused almost exclusively on the motion for judgment notwithstanding the verdict in making its ruling.[15] As to the motion for new trial, it merely stated: "Because [GDC] are entitled to judgment as a matter of law, it follows they are also entitled to a new trial because the jury's verdict is against the clear weight of the evidence." Given the

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[14] *See Richbow v. District of Columbia*, 600 A.2d 1063, 1066 (D.C. 1991) ("what variously has been described as the 'clear' or 'great' weight of the evidence").

[15] In their briefs to this court, the parties also focused on the judgment as a matter of law and spent little time on the new trial issue.

comprehensive assessment of the evidence necessary to rule on a new trial motion, *see Lyons, supra*, 667 A.2d at 324, the trial court's summary grant of a new trial by reference to the judgment notwithstanding the verdict, without express consideration of the evidence on both sides and its relative weight, causes difficulty in terms of appellate review.

This is a complicated case involving a great deal of testimony and evidence, all of which the trial court had the benefit of seeing and hearing first hand. It may be that, even if, as we have concluded, the evidence was sufficient to go to the jury, after weighing the evidence and considering how the jury evaluated the evidence in returning a verdict for Breezevale, the trial court will conclude that a new trial is warranted because the verdict is against the clear or great weight of the evidence. *See Oxendine, supra*, 506 A.2d at 1110. However, in the absence of the trial court's analysis applying the standard for new trial motions, we are unable to conduct our appellate review with the proper level of scrutiny. Furthermore, there may be a question on the trial court's intended scope of the new trial, in light of the several findings of the jury. Under the circumstances, we remand the case to the trial court to consider further its grant of a new trial.[16] The court may then rule on whether there should be a new trial, and, if so, the grounds therefor and whether the new trial, should be on "all or part of the issues" pursuant to Super. Ct. Civ. R. 59(a).[17]

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[16] The trial court's grant of a new trial is an order normally not subject to interlocutory appeal and is before us at all at this point only because it comes coupled to the grant of judgment as a matter of law. *See Lyons, supra*, 667 A.2d at 324 n.14 ("Although an order granting a new trial is not appealable ordinarily until after the new trial has been held, an exception is made where, as here, the trial court granted the motion for judgment notwithstanding the verdict and, in the alternative, the motion for a new trial.").

[17] A new trial may be granted under Rule 59 "for any of the reasons for which new trials have been granted in actions at law in the courts of the

III. Sanctions

The trial court has "inherent power" to sanction parties for intentionally abusing the litigation process. *See Jemison v. Nat'l Baptist Convention USA, Inc.*, 720 A.2d 275, 282 (D.C. 1998). Although GDC filed its request for sanctions against Breezevale as a "counterclaim," the record indicates that the trial court in fact largely treated it as a motion for sanctions, so we also treat it as such for purposes of this appeal.[18]

Given the "inherent power" of the trial court, sanctions may properly be imposed against a party found to have forged documents in an apparent attempt to bolster a portion of its case and then steadfastly lied about it while litigating another case, so long as they are proportionate to the conduct and to the matter at issue in the litigation. As we explained in *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28 (D.C. 1986) (*Synanon II*):

> [T]he conduct which would justify an award of bad faith attorneys' fees may be found either in the filing of a frivolous claim or in the manner in which a properly filed claim is subsequently litigated. The measure of the fee award differs depending on which is the case. Bad faith attorneys' fee awards are limited to payment for work and expense attributable to the guilty party's bad faith endeavors. Therefore, where a suit has been filed in

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United States or of the District of Columbia." See the extrinsic discussion of various grounds in 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: Civil 2d §§ 2805 to 2810 (1995). As to partial new trials, *see id.* at § 2814.

[18] The court expressly recognized before trial that the ultimate issue was whether Breezevale's filing suit against GDC constituted an "abuse of the judicial process," the hallmark basis for imposing sanctions, *see Jemison, supra*, 720 A.2d at 282; *Chevalier v. Moon*, 576 A.2d 722, 724 (D.C. 1990), and agreed at Breezevale's request to bifurcate the equitable issue of bad faith litigation for a bench ruling after the jury returned its verdict.

> bad faith, the court has discretion to award the entire legal expenses incurred by the defendant. Conversely, in an action not in itself brought in bad faith, an award of attorneys' fees should be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves.

Id. at 38-39 (internal quotation marks and citations omitted).

The problem here, however, is that the trial court's imposition of sanctions appears, for purposes of appellate review, to be inextricable from its legal conclusion, reflected in its grant of judgment as a matter of law, that Breezevale's suit against GDC had no substantive merit whatever. We have previously expressed our disagreement with this conclusion, which cannot be reconciled with the jury's verdict. An exercise of discretion must rest on correct legal principles, *see Knight v. Georgetown Univ.*, 725 A.2d 472, 486 (D.C. 1999), and a discretionary decision based on an "erroneous premise" cannot stand. *Killingham v. Wilshire Inv. Corp.*, 739 A.2d 804, 811 (D.C. 1999). *See generally Johnson v. United States*, 398 A.2d 354 (D.C. 1979). Therefore, we must at this point vacate the imposition of the sanction, without prejudice to a decision whether to impose an award following an exercise of discretion based on correct legal principles.[19]

In so holding, however, we do not intend to suggest that Breezevale is necessarily beyond the sanctioning power of the trial court on remand. We reject Breezevale's contention that the trial court lacks authority to sanction parties for illegal or

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[19] Thus, we need not specifically address Breezevale's arguments on appeal that both the imposition of a $1,000,000 punitive sanction and the award of unpaid legal fees were improper under the circumstances of this case. As to the propriety of punitive damages, see *Synanon II, supra*, 517 A.2d at 39; *Zanville v. Garza*, 561 A.2d 1000 (D.C. 1989). As to the unpaid legal fees, that award is different from the sanctions in nature, but ultimately must be reversed for the same reason, *i.e.* because it is premised on the trial court's erroneous view of the merits.

unethical litigation tactics simply because their substantive claims have some merit. The language of *Synanon II, supra*, would make no sense unless one assumes that a party may have colorable claims but still engage in sanctionable bad faith litigation. *See Synanon II, supra*, 517 A.2d at 38 ("the conduct which would justify an award of bad faith attorneys' fees may be found either in the filing of a frivolous claim or in the manner in which a properly filed claim is subsequently litigated").

In fact, in *Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254 (D.C.) (*Synanon I*), *cert. denied*, 479 U.S. 815 (1986), we specifically rejected the plaintiff s argument that its suit could not be dismissed for bad faith conduct during discovery until judgment was rendered, stating that the civil rules do not "subsume or abrogate" the trial court's "inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." *Id.* at 1264 (citation omitted). It would not only contradict our previous decisions but ignore reality to suggest that only parties who have no valid claims whatsoever abuse the judicial process. The trial court has the inherent authority to police itself against those who would abuse its processes, regardless of the substantive merits of their underlying claims.

For the foregoing reasons, the judgment as a matter of law entered in favor of GDC is reversed, except as it pertains to the Nigeria claim; the entry of judgment as a matter of law on the Nigeria claim is affirmed; the order concerning sanctions for bad faith litigation and unpaid legal fees is vacated; and the case is remanded for further consideration of the motion for a new trial and for further proceedings consistent with this opinion.

So ordered.

SCHWELB, *Associate Judge*, concurring: I concur in the judgment of the court and join Judge Steadman's opinion. The jury apparently found that although plaintiff Breezevale, through its officers and employees, fabricated offer letters and related documents in an attempt to deceive the court and to defraud Firestone, the plaintiff would probably have prevailed at trial in its suit against Firestone notwithstanding the forgeries and associated false testimony. To be sure, the fabrication of evidence could logically have infected Breezevale's case against Firestone in its entirety,[1] and I agree with the trial judge that the plaintiff's chicanery would almost certainly have been exposed anyway even if Breezevale had found a way to postpone Ms. Paul's deposition. Nevertheless, GDC has not demonstrated that the award of damages to Breezevale was unreasonable, for the fabricated documents related solely to a single discrete part of the Firestone litigation, and the jury did not find them decisive even as to that part. Accordingly, although I agree with the trial judge's unfavorable assessment of Breezevale's conduct, I join Judge Steadman in concluding that Breezevale's case against GDC does not fail as a matter of law for lack of proof of the requisite causal link between GDC's negligence and Breezevale's damages. I write separately, however, to emphasize

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[1] It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the case's lack of truth and merit. *The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.*

Mills v. United States, 599 A.2d 775, 783-84 (D.C. 1991) (emphasis in original) (quoting II J. WIGMORE, EVIDENCE § 278, at 133 (Chadbourn ed. 1979).

that nothing in the court's opinion should be read as countenancing the kind of litigation tactics revealed by this record, or as limiting the authority of the trial judge to sanction Breezevale's misconduct in conformity with correct legal principles.

"Our adversary system depends on a most jealous safeguarding of truth and candor." *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1131 (E.D. Ark. 1999) (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 463 (4th Cir. 1993)). Lying to the court, or engaging in related deceptive practices, is "serious business." *Medrano-Quiroz v. United States*, 705 A.2d 642, 653 (D.C. 1997). "We [have] join[ed] Justice Kennedy in his rejection of the notion that one who violates his testimonial oath is no worse than the student who claims the dog ate his homework." *Coumaris v. District of Columbia Alcoholic Bev. Control Bd.*, 660 A.2d 896, 901 (D.C. 1995) (quoting *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 325-26 (1994) (Kennedy, J., concurring)).

Unfortunately, deception in judicial proceedings is not as unusual as it ought to be. In the centuries that have elapsed since Adam took that first bite of the apple in the Garden of Eden, a great many people, some of them powerful and famous, have been found to have lied under oath or to have otherwise done their best to conceal the truth and to subvert judicial proceedings. "Judges, lawyers and experts on the court system worry that perjury is being committed with greater frequency and impunity than ever before." Mark Curriden, *The Lies Have It*, 81 A.B.A. J. 68 (1995); *see also* Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755 (1996). A cynical observer who has seen it all might conclude that this sort of thing "goes with the territory" and that judges should not get too excited about it. Indeed, in one matrimonial controversy, this court referred, either infelicitously or ironically, to "a tolerable amount of perjury." *Coles v. Coles*, 204 A.2d 330, 331-32 (D.C. 1964). But when

fabrication of evidence or similar fraud has been discovered and exposed, the consequences ought to be severe enough to inhibit repetition. This case presents an unusually tawdry example of fraudulent litigation practices, and the judge did not and does not lack the authority to do something about it.

Three years after having settled with Firestone for $100,000 (rather than for the $3,500,000 offered by that defendant before Ms. Paul disclosed the forgeries), Breezevale brought this suit against GDC. Breezevale continued to insist that Ms. Paul was lying and that the offer letters and spreadsheets were genuine. Breezevale executives so testified under oath, but neither the jury nor the judge believed them. On the verdict form, the jury was asked:

> Do you find that [GDC] has established that forgeries occurred and, if so, that one or more Breezevale executives participated in such forgeries?

The jury answered: "Yes." Subsequently, in awarding GDC sanctions against Breezevale, the trial judge wrote that he had

> focused on the evidence directly relevant to the core question presented by the case: Did Breezevale forge offer letters in February of 1991 and thereupon litigate in bad faith? The [c] ourt has no difficulty in concluding the evidence clearly and convincingly compels an affirmative answer to the question.
>
> Joseph Abou Jaoude, with the knowledge of Charles Awit and approval of Habib Habib, undertook in February 1991 to boost Breezevale's case against Firestone by creating a false 1987 record of business activity on Firestone's behalf. Once the fraud was disclosed and Breezevale's case against Firestone destroyed, Breezevale executives, rather than accept the outcome, chose to sue their lawyers for legal malpractice, asserting the documents at issue were genuine, yet knowing them to be false.

> It is difficult to envision a clearer case of bad faith litigation. Not only did Breezevale make Gibson Dunn lawyers unwitting accomplices in its attempted fraud on Firestone when it created the forged documents and delivered them for discovery, but it then sought to punish Gibson Dunn for [Breezevale's] own misconduct. The cost to Gibson Dunn has been enormous. The cost to this [c]ourt and to the citizens of the District of Columbia, although obviously not as great, is also considerable. While the city may not be able to recoup, Gibson Dunn can.

These findings by the judge find overwhelming support in the record,[2] and they must ultimately inform the court's exercise of discretion in the imposition of sanctions. I think it important to emphasize that, as the trial judge pointed out, the issue as to which Breezevale presented fabricated evidence was "the core question presented by the [malpractice] case." Even if we assume, in light of the jury's verdict, that Breezevale's action against GDC was "not in itself brought in bad faith," *see Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 38 (D.C. 1986) (*Synanon II*), it is significant that Breezevale's key allegation in the malpractice case was untrue and known by Breezevale to be untrue. The testimony offered in support of that allegation was likewise false. The final disposition of this case should reflect this underlying reality.[3]

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[2] In his 23-page opinion, the judge explicated, persuasively and in meticulous detail, why he, like the jury, credited Ms. Paul's account and disbelieved the denials by Breezevale's executives. I therefore believe that it is now unnecessary for the trial court to revisit this issue on remand. See maj. op., *ante*, at n.17 (citing authority for partial new trials). To retry the question whether the documents were forged would be to add to these proceedings further costs which, as the judge noted with a measure of understatement, the District "may not be able to recoup."

[3] As an alternative basis for affirmance, GDC seeks to invoke the principle that "[n]o court will lend its aid to a man who founds his cause of action on an immoral or illegal act." *Hunter v. Wheate*, 53 App. D.C.

206, 208, 289 F. 604, 606 (1923) (quoting *Higgins v. McCrea*, 116 U.S. 671, 686 (1886) (quoting Lord Mansfield in *Holman v. Johnson*, 1 Cowper 341, 343, 98 Eng. Reports Reprint 1120, 1121)); *see also Horjales v. Loeb*, 291 So.2d 92, 93 (Fla. Dist. Ct. App. 1974) ("One who engages in a fraudulent scheme loses all right to the prosecution of a lawsuit."). The doctrine of *Hunter* and like cases has been applied in actions for legal malpractice. *See, e.g., Carmel v. Clapp & Eisenberg, P.C.*, 960 F.2d 698, 704 (7th Cir. 1992) ("the appellant's own fraud may bar his legal malpractice claim in connection with transactions complained of"); *Mettes v. Quinn*, 411 N.E.2d 549, 551-52 (Ill. App. 3d 1980) (dismissing action against attorney who allegedly rendered negligent advice, where this advice led to setting aside of favorable settlement agreement which had been induced by client's misrepresentations). GDC's reliance on these authorities is not implausible, for the central allegation of Breezevale's malpractice suit has been found by both judge and jury to be false.

Having ruled in GDC's favor on other grounds, the trial judge did not reach the issue whether dismissal was appropriate on the grounds that Breezevale had founded its action on its own illegal or immoral conduct. Although this court is free to affirm a judgment on grounds not relied upon by the trial judge, *see, e.g., In re O.L.*, 584 A.2d 1230, 1232 n.6 (D.C. 1990), I do not believe that it would be appropriate to do so in this case. The jury found that Breezevale had some legitimate claims, and "the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts." *Synanon II, supra*, 517 A.2d at 37; *see also Lipsig v. National Student Mktg. Corp.*, 214 U.S. App. D.C. 1, 3-4, 663 F.2d 178, 180-81 (1980) (per curiam). The weighing of the relevant considerations would have required the trial judge to exercise his discretion, and in this case the judge has not yet had occasion to do so, so affirmance would be premature. Moreover, in general, the principle of Hunter has been applied in situations in which the plaintiffs recovery depended entirely on his fraudulent conduct, so that he could not recover without invoking the fruits of his own fraud. The jury's verdict in this case recognizes the validity of some of Breezevale's claims and thus suggests that dismissal on *Hunter* grounds would not be warranted.

APPENDIX E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

[Filed November 26, 1997]

94-CA-10818
Judge Steffen W. Graae
Calendar No. 4

BREEZEVALE LIMITED,

Plaintiff,

v.

TIMOTHY DICKINSON, ESQ., *et al.*,

Defendants.

MEMORANDUM ORDER OF JUDGMENT

On July 30-31, 1997, Gibson Dunn presented evidence in support of their counterclaim in two counts: (1) reimbursement for fees and expenses incurred as result of Breezevale's bad faith litigation[1], and (2) payment of fees and expenses Gibson Dunn billed Breezevale for legal services rendered in the underlying Firestone litigation. Gibson Dunn also argued for assessment of punitive damages in addition to reimbursement for bad faith litigation. The Court took these matters under advisement, pending decision on Breezevale's motion for judgment on Gibson Dunn's counterclaim. That motion was decided in Gibson Dunn's favor on October 16, 1997, thus making their monetary claims ripe for decision.

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[1] On May 1, 1997, the Court by Memorandum Order found that Breezevale had presented its legal malpractice claim against Gibson Dunn in bad faith.

I. *The Bad Faith Litigation Claim*

Gibson Dunn are seeking reimbursement for $2,970,210 in attorneys' fees and $1,247,591.67 in expenses incurred since Breezevale filed its legal malpractice suit in October 1994 (summarized on Def. Ex. 654). Because Gibson Dunn represented themselves in this litigation, the attorneys' fees at issue are based on the time spent by Gibson Dunn lawyers and staff multiplied by the hourly rates they would have charged a client. The expenses at issue include costs for outside services and fees paid to experts (Def. Ex. 656, summarizing Def. Exs. 635 through 644). The question for decision is whether Breezevale should pay all or a portion of the fees and expenses Gibson Dunn are seeking.

A. *The Legal Standards*

It is well settled that where "the action itself was brought in bad faith, fees for the entire proceeding may be awarded." *Gen. Fed. of Women's Clubs v. Iron Gate*, 537 A.2d 1123, 1128 (D.C. 1988). Given the Court's earlier finding by clear and convincing evidence that Breezevale filed and prosecuted its suit against Gibson Dunn in bad faith, it follows that the Court should consider awarding all the fees and expenses Gibson Dunn incurred from the date it was served with Breezevale's complaint.

The formula for calculating an award of attorneys fees begins with calculation of the "lodestar"—that is, the number of hours reasonably expended multiplied by a reasonable hourly fee. The "lodestar" can then be adjusted as appropriate to account for factors[2] that may call for an increase or

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[2] The twelve factors are: (1) time and labor required, (2) the novelty and difficulty of the question, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the result obtained, (9) the

decrease in the amount awarded. *See Gen. Fed. of Women's Clubs* at 1130 and cases cited therein. Similar rules apply with respect to expenses—the Court must determine if they are reasonable and were appropriate to the case.

B. *Attorneys' Fees*

As noted, Gibson Dunn are asking to be reimbursed $2,970,210 for the time their lawyers spent in defending Breezevale's suit. During the course of the litigation, eleven lawyers, five paralegals, and three project assistants worked on the case, with time for each billed at the individual hourly rates normally charged to the firm's clients. Terrence O'Donnell, Esq. testified as Gibson Dunn's expert on fees and opined that these hourly rates were consistent with those charged by lawyers of similar longevity and experience in other major law firms. Noting that Breezevale's own lawyers charge at comparable hourly rates (Def. Ex. 348) and hearing no evidence to the contrary, the Court accepts Mr. O'Donnell's opinion that Gibson Dunn's hourly rates are reasonable. Moreover, the courtroom performance of those Gibson Dunn lawyers who appeared at trial make it clear they are among the best.

Similarly, there would be no rationale for the Court to reduce[3] the "lodestar" figure based on consideration of the "twelve factors." Factually, if not legally, this case was extraordinarily complex, calling for a level of effort and skill well beyond the ordinary. There can be no doubt the case was of the greatest importance to Gibson Dunn, justifying the assignment of their ablest and most experienced litigators—a

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experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, (12) awards in similar cases. *Ungar v. Rental Housing Com'n*, 535 A.2d 887, 890, n. 8 (D.C. 1987).

[3] Gibson Dunn made no request that the "lodestar" figure be increased, nor would such a request appear to be justified.

decision that necessarily precluded these attorneys from working on fee-generating employment. Had they lost, Gibson Dunn would not only have faced a substantial judgment, but also been out their heavy investment in the case. As it was, Gibson Dunn were, despite the jury's confused verdict, entirely successful in defending against Breezevale and prevailing on their counterclaim. They should be reimbursed in accordance with the "lodestar" amount.

More difficult is the Court's task of determining whether Gibson Dunn needed to devote as much manpower and as many hours to the litigation as they did. It is simply not feasible for the Court to look behind thousands of billing entries to determine if they represent reasonable expenditures of time or resources nor is that something the trial court is required to do. *Henderson v. District of Columbia*, 493 A.2d 982, 1001 (D.C. 1985). Yet, the Court is mindful that Gibson Dunn were not operating within the usual constraints lawyers face when justifying a bill to a client. They were their own client and, thus, might decide to prepare and file a motion with a ten percent chance of success that they could not reasonably expect a paying client to authorize.

A couple of instances serve to make this point: Gibson Dunn's Motion for Rule 11 Sanctions, filed 8/2/96, and their Motion for Security for Costs and Charges, filed 8/8/96, were untimely given the 7/8/96 closing date for filing of motions and, thus, had little or no chance of success. Nevertheless, it appears from a review of Gibson Dunn's 1996 billing records from March (Def. Ex. 621), May (Def. Ex. 623), July (Def. Ex. 625), and September (Def. Ex. 627), that attorneys John Sharer, Theodore Boutrous, Jonathan Tycko, and Hassan Zavareei billed something approaching $40,000 in time for work relating to these motions and the other pleadings they spawned.[4] One could reasonably expect a paying client to

[4] Moreover, there were no doubt expenses arising out of this work that the Court is unable to ferret out from the billing records.

balk at footing such a bill—a point which raises the question whether it would be fair to make Breezevale pay it.

The roughly $40,000 worth of attorneys' time devoted to the two above-described motions represents approximately 5% of all attorney time billed for March, May, July, and September 1996 (i.e. $40,000 808,230 = .05). If one were to take the time spent on these motions as representative of "excessive" time and extrapolate to the entire case, Gibson Dunn's attorneys' fee claim would be reduced by $148,511 (i.e. $2,970,210 x .05 = $148,511). However, such an extrapolation would necessarily be arbitrary because the Court has no practical way of going behind all the litigation judgments Gibson Dunn made to determine if it is even in the ballpark.[5]

In any event, the Court is persuaded there are several good reasons for not discounting Gibson Dunn's attorneys' fees. First, Mr. Boutrous testified to excluding from their claim $467,290 in fees attributable to Messrs. Howell, Dickinson, and Millian, three of the named defendants. Arguably, time these lawyers took from other fee-paying work to assist their colleagues in defense of a suit brought in bad faith could reasonably be charged to Breezevale. Second, Mr. Boutrous testified to cutting another $427,756.25 in fees, costs, and expenses that he felt included time and effort that was inefficiently spent or did not lead to productive results. Third, Gibson Dunn put an April 30, 1997 time limit on their claim, despite their right to seek compensation for fees and expenses incurred after that date in litigating their fee claims. In effect, Gibson Dunn have themselves taken a discount far exceeding what the Court would likely have done.

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[5] That is not to say Gibson Dunn's time records are insufficiently detailed. In fact, the Court is satisfied that Gibson Dunn's record-keeping on attorney time meets the standards set forth by the U.S. Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 437, n.12 (1983).

B. *Costs and Expenses*

Gibson Dunn have asked reimbursement for $1,247,591.67 in costs and expenses incurred through April 30, 1997. For purposes of analysis, the Court will consider separately the $671,061.06 in expenses Gibson Dunn labeled "Disbursements to Experts, Consultants, and Solicitors" (Def. Ex. 656). The Court will denominate the balance as "Other Costs and Expenses."

(1) *Experts, Consultants and Solicitors*

This category includes expert fees that Gibson Dunn are not entitled to claim: specifically, billings from Sutherland Asbill & Brenner relating to time Hamilton P. Fox III, Esq. spent working on Gibson Dunn's contractual claim against Breezevale for moneys owing in the underlying Firestone litigation. This was the only topic on which Mr. Fox testified and is clearly unrelated to the bad faith litigation claim. However, the Court has no way of knowing what portion of Sutherland Asbill's $81,962.60 bill is attributable to services rendered on other matters in the case. The Court notes that Sutherland Asbill were apparently paid for advice on legal malpractice issues, notwithstanding the $47,700 paid to Professor Thomas D. Morgan who, in fact, testified at length and was the only expert witness called by Gibson Dunn on the malpractice issues. Even if the Court could determine what part of Sutherland Asbill's fees were related to the malpractice claim, it would be unreasonable to pass it on to Breezevale given the role of Professor Morgan. The entire bill from Sutherland Asbill is therefore disallowed.

The Court has similar difficulties charging Breezevale with the bills from Carter & Varrone and Richard Guster, Esq. These attorneys were also retained to give advice on the legal malpractice issues, but neither Mr. Carter nor Mr. Guster was called as a witness and, in any event, would have been redundant to Professor Morgan. The Court will not charge

Breezevale for Carter & Varrone's $23,090.59 bill or Mr. Guster's $9119.57 bill.

One might take issue with Brunelle Forensic Laboratories' $51,954.59 fee, given the questionable validity of Mr. Brunelle's research and opinions on ink dating. However, the Court is mindful that the age of various documents was a significant issue in the case and that Breezevale also produced an expert on this topic. Thus, it was a reasonable decision on Gibson Dunn's part to engage the services of Brunelle.

Mr. Edwin Alford of Miller, Hargett & Alford, Mr. John Jessen of Electric Evidence Discovery, Inc., Dr. Jonathan Walker of Economists, Inc., and Professor Thomas Morgan all provided services and testimony essential to Gibson Dunn's case. The Court has no basis for questioning the reasonableness of their fees. Similarly, the Court has no basis for questioning the necessity for the services of London Solicitors Warner Cranston given the extensive preparatory and discovery work that had to be done in London. Finally, the Court saw for itself the highly sophisticated and efficient services provided at trial by Trial Presentation Technologies. Although their $275,285.51 bill was large, the Court is persuaded this was money well spent given the need for clarity of presentation in a highly complex, documented-driven case.

In the final analysis, the Court reduces Gibson Dunn's claim in this category of expenses by $114,172.17 to $556,888.89 (i.e. $671,061.06 less $114,172.17 = $556,888.89).

(2) *Other Costs and Expenses*

The balance of $576,530 Gibson Dunn are requesting covers all other costs and expenses charged to the case. They include such items as telephone charges, messenger services, air freight, Lexis and Westlaw research, taxi fares, national

and international air travel, lodging, filing fees, duplication, computer services, deposition expenses, daily trial copy, and transcript digesting.

Inhouse and contracted duplication represents nearly $150,000 of Gibson Dunn's claim—an amount that could well be subject to cuts if the Court had a basis for doing so. It seems obvious that Gibson Dunn should not be permitted to make a profit on duplication done inhouse where the issue is one of shifting actual costs to the other party. However, Ereezevale made no effort to explore the question at trial and the record is therefore silent as to Gibson Dunn's per page charges and actual per page costs. Thus, the Court has no basis for considering a reduction of this claim.

A substantial portion of Gibson Dunn's reimbursement claim relates to expenses for travel and lodging for lawyers they assigned to the case. Most charges were clearly reasonable and appropriate, given the necessity for taking depositions and doing other litigation-related work in London and other cities outside Washington, D.C. However, the Court does not believe that Breezevale can fairly be charged with Gibson Dunn's decision to bring in lawyers from their Los Angeles office to litigate the case. Gibson Dunn were sued in Washington, D.C., where they have a large and experienced staff of attorneys, including many who are no doubt fully capable of representing the firm at trial. Bringing Mr. Stern and Mr. Sharer of the Los Angeles office into the case added $39,939.20 in travel and lodging expenses to the cost of the litigation.[6] These expenses should not be shifted to Breezevale.

Def. Ex. 628 shows a $2,336.55 "expert fee" to Walter Stratton. Inasmuch as Mr. Stratton was not an expert but a defendant in the case, this charge is disallowed.

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[6] This calculation is based on a review of Def. Exs. 264, 268, 270, 273, 274, 276, 622, 623, 625, 626, 627, 629, and 632.

In all, the Court disallows $42,276 ($39,939.20 + 2,336.55) in costs and expenses, thereby reducing Gibson Dunn's claim to $534,254 in this category.

II. *Fees and Expenses from the Firestone Litigation*

After the disastrous collapse of Breezevale's case against Firestone led to a $100,000 settlement on November 5, 1991, Breezevale refused to pay the balance of Gibson Dunn's fees and expenses. (Pl. Ex. 382). Gibson Dunn ultimately formalized their demand for a payment of $296,795.94 by letter Mr. Wesley G. Howell, Jr. sent to Breezevale on August 26, 1993.[7] (Def. Ex. 451). At trial, that sum was later adjusted downward by $1,515.90 to a final demand of $295,280.04.

Gibson Dunn's claim for fees and expenses for services provided in the underlying Firestone litigation stands on a substantially different footing from their bad faith litigation claim. In this instance, on October 23, 1989, Gibson Dunn sent Mr. Habib of Breezevale a confirmatory letter setting out the terms of engagement, billing rates, and billing procedures. (Def. Ex. 655). By return facsimile communication just a few days later, Breezevale agreed to those terms, declining only Gibson Dunn's request for a $10,000 advance. (Def. Ex. 432). Thus, the Court concludes that Gibson Dunn's bill for services rendered is presumptively payable by Breezevale.

Gibson Dunn called Hamilton P. Fox III, Esq., as their expert on the reasonableness of the fees and expenses billed. He reviewed the billing statement (Def. Ex. 263) and Gibson Dunn's files relevant to the billings, concluding that the billing rates were reasonable (as, of course, Breezevale had earlier agreed when it retained the firm) and that the time expended on the various services rendered was reasonable and appropriate. Breezevale offered no expert testimony to

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[7] The Court is persuaded that Gibson Dunn never waived or forgave their claim to these fees and expenses. See Pl. Ex. 381.

contradict Mr. Fox. Finding Mr. Fox's opinions to be both reasonable and soundly based, the Court concludes that Gibson Dunn are entitled to payment of their entire $295,280.04 bill for services rendered in representing Breezevale in its case against Firestone.

III. *Punitive Damages*

Breezevale argues that punitive damages cannot be imposed where costs have already been levied for bad faith litigation. Inasmuch as bad faith litigation costs are deemed "punitive" in nature, *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28, 37 (D.C. 1986), Breezevale's argument has at least surface appeal. However, contrary to Breezevale's reading of the cases, neither *Synanon* nor *Zanville v. Garza*, 561 A.2d 1000 (D.C. 1989), stands for the proposition that punitive damages are precluded when bad faith litigation costs are imposed.

In *Synanon*, the Court made clear that it was not presented "with the question whether the trial court has inherent power to assess monetary sanctions against a bad faith litigant apart from any award of attorneys' fees." *Id.* fn. 7 at 38. Rather, the Court was addressing Synanon's claim that the trial judge had awarded attorneys' fees unrelated to bad faith litigation, thereby awarding "punitive damages under another name." But the Court was careful to observe that

> We do not suggest that an award of punitive damages would have been inappropriate in the present case, but such an award was not made, nor could it have been absent a trial. *Id.* at 39.

Indeed, the *Synanon* Court goes on to explain that fees and expenses incurred in defending against bad faith litigation are not the measure of punitive damages. Rather, where punitive damages are warranted, the amount to be awarded is dependent on the peculiar circumstances of each case, such as

"the degree of malice, wantonness, oppression or outrage of the [litigant's] conduct. . . ." *Id.* at 39.

In *Zanville*, the appellate Court reversed the trial judge's award of punitive damages, not because they are precluded by an award of bad faith litigation costs, but because the award was tied to a count on which the judge had not awarded compensatory damages and there was insufficient other support in the record for a finding of malice or evil motive. The Court reiterated what it said in *Synanon*: "There is no question that sanctions and attorneys' fees are appropriately imposed for improper trial tactics and bad faith litigation." *Id.* at 1002. (Emphasis added).

In sum, the Court reads the caselaw to say that a party seeking punitive damages in such circumstances as here must (1) make a formal claim, (2) prove at trial that litigation was conducted in bad faith, (3) with malice or evil motive. Gibson Dunn made a formal claim for punitive damages and, as the Court has already ruled, proved at trial that Breezevale filed and prosecuted its case in bad faith. As discussed below, Breezevale's conduct sinks to a depth of such corrupting cynicism as to justify the imposition of punitive sanctions.

Breezevale Limited—a foreign corporation doing business out of London, U.K.—invoked the rights and benefits of the American judicial system when it filed its suit against the Firestone Tire Corporation in the United States District Court in Akron, Ohio. In the course of that litigation, Breezevale perpetrated a fraud upon its own lawyers and upon Firestone when it forged documentsn aid of its case and provided same to Firestone in discovery. When the misconduct was disclosed by a Breezevale employee who implicated all of the principal executives of the company (Messrs. Habib, Awit, and Abou Jaoude), Firestone prepared and threatened to file with the District Court a motion that would likely have led to dismissal of Breezevale's case and imposition of substantial sanctions. Having been found out, Breezevale settled with

Firestone in an amount that can best be described as "nuisance value."

Despite the obvious lessons they should. have learned from that experience, Breezevale executives then sought to perpetuate their fraud by suing their lawyers in this Court some three years later, insisting that Gibson Dunn committed legal malpractice when they failed to investigate and thereby ascertain that the documents were genuine, not forged. But the evidence at trial was absolutely clear and convincing that the documents were forged, thereby exposing the sworn testimony of Messrs. Habib, Awit, and Abou Jaoude as cynical lies. The Court cannot imagine a worse abuse of the judicial process or a more deserving cause for punishment.

Playing out Breezevale's fraudulent claims to their ultimate conclusion cost the citizens of the District of Columbia untold thousands of dollars in jury fees, court staff time, overhead, and judicial resources. The case took nearly two months to try and literally hundreds of hours of judicial time both before and after verdict—time and effort far better devoted to legitimate disputes.

What is an appropriate sanction? Gibson Dunn have asked for $8 million on the theory that this sum represents a fair proportion of the damage claim Breezevale made against Gibson Dunn. However, the amount requested is arbitrary, high, and bears no known relationship to Breezevale's ability to pay.[8] Moreover, the Court believes it appropriate in asses-

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[8] Where a punitive damages claim is based on ability to pay, the movant must present evidence as to net worth. *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995). Gibson Dunn's claim is not based on net worth, perhaps because they failed to obtain timely discovery on the point. However, *Woodner* teaches that punitive damages should be sufficient to inflict punishment, but not so great as to lead to bankruptcy. Based on what the Court learned at trial about Breezevale, it is inclined to think $8 million might put Breezevale out of business.

sing punitive damages also to consider what Gibson Dunn have already been awarded on their bad faith litigation claim.

The Court concludes that Breezevale should pay Gibson Dunn $1 million in punitive damages. Given all the other expenses Breezevale faces as result of this lawsuit, the Court believes this additional penalty will hurt, but is not so great as to be beyond Breezevale's ability to pay.

JUDGMENT

Wherefore, in view of the foregoing analysis of Gibson Dunn's claims, they shall have Judgment against Breezevale as follows:

(1) $2,970,210 in attorneys' fees and $1,091,143 in costs and expenses for bad faith litigation;

(2) $295,280 in fees and expenses due and owing for services Gibson Dunn rendered to Breezevale in its suit against Firestone; and

(3) $1,000,000 in punitive damages.

It is so ORDERED this 24th day of November, 1997.

/s/ Steffen W. Graae
STEFFEN W. GRAAAE
Associate Judge

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APPENDIX F

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

[Filed May 2, 1997]

94-CA-10818
Judge Steffen W. Graae
Calendar No. 4

BREEZEVALE LIMITED,
Plaintiff,

v.

TIMOTHY DICKINSON, ESQ., *et al.*,
Defendants.

MEMORANDUM ORDER ON DEFENDANTS' MOTIONS FOR JUDGMENT AND, ALTERNATIVELY, NEW TRIAL

Before the Court are a number of post-verdict motions filed by both sides. Only two will be addressed here:[1] specifically, defendants' Motion for Judgment pursuant to Sup. Ct. Civ. R. 50 and their alternative Motion for New Trial pursuant to Sup. Ct. Civ. R. 59.

Posture of the Case

Plaintiff's legal malpractice claims were tried before a jury, which rendered a verdict in plaintiff's favor. Defendants' counterclaim, alleging bad faith litigation by plaintiff and seeking counsel fees, is equitable in nature and, thus, must be tried to the bench. That is yet to be done. Consequently, no final judgment pursuant to the requirements of Sup. Ct.

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[1] All other motions are addressed in separate orders issued contemporaneously herewith.

Civ. R. 58 has been entered pending the outcome on the counterclaim.

However, it is nonetheless clear that defendants' Rule 50 and Rule 59 motions are ripe for decision and necessarily must be decided before the remaining issues in this lawsuit' can be addressed. The Court's decision on whether the jury's verdict can stand will drive the outcome in the balance of the case.

Factual Background

A brief description of events in the underlying Breezevale-Firestone litigation is essential to understanding the genesis of this case and the issues tried to the jury last fall.

Defendants Gibson, Dunn, & Crutcher (Gibson Dunn) represented plaintiff Breezevale in a lawsuit against Firestone Tire Corporation (Firestone) filed in U.S. District Court in Akron, Ohio. Jones, Day, Reavis, & Pogue (Jones Day) represented Firestone.

On the October 13, 1991 eve before Jones Day was to take the deposition in London of Rebecca Paul (a Breezevale employee), Paul disclosed to John Millian, a Gibson Dunn lawyer, that a number of documents (offer letters) Breezevale had produced to Firestone in support of its claims were forgeries she had prepared at the instruction and with the participation of Joseph Abou Jaoude, a Breezevale executive. On the next morning, Paul met with Millian and Walter Stratton, a Gibson Dunn partner, to repeat the account she had given the night before.

Stratton decided to present Paul to Jones Day for deposition that morning without first consulting with Breezevale officers. She made no damaging disclosures at the morning session. During the lunch break, Stratton and Millian went to Breezevale's offices to advise their client of the testimony Paul was about to give. At that point, Habib Habib of

Breezevale asked Stratton to stop the deposition and conduct an investigation to confirm his assertion that Paul was lying. Stratton refused. That afternoon, Paul testified to the forgery of documents. On a subsequent day, she brought corroborating documentation from her home which was made part of her deposition record.

Immediately upon completion of Paul's deposition, Jones Day began preparation of a motion for sanctions seeking dismissal of Breezevale's suit against Firestone for fraud and misconduct. The motion was completed but not filed. On the imminent threat of its filing, Habib entered into a settlement with Firestone on November 5, 1991 wherein the latter agreed to pay $100,000 in exchange for Breezevale's dismissal of its lawsuit. Thus, Paul's deposition had within days destroyed Breezevale's case, reducing its value from what Habib claimed was in the millions to a $100,000 nuisance settlement.

On October 7, 1994, Breezevale filed suit in D.C. Superior Court, claiming that Gibson Dunn engaged in legal malpractice when its lawyers presented Paul for deposition without first consulting their client and, then, after being asked to stop the deposition, refusing to do so. The heart of Breezevale's malpractice action is its claim that documents Paul testified were forged are, in fact, genuine and that Gibson Dunn would have so discovered if they had postponed her deposition and conducted a thorough investigation. In addition to punitive damages, Breezevale sought as compensatory damages from Gibson Dunn whatever it would have obtained in its underlying suit against Firestone were it not for the damage done by Paul's deposition.

In defense, Gibson Dunn took the position that Millian and Stratton acted within appropriate professional standards when they presented Paul for deposition over the objection of Breezevale and that postponement would have made no difference because Jones Day would inevitably learn that Paul and Abou Jaoude forged the documents at issue. As an

affirmative defense, Gibson Dunn asserted Breezevale was contributorily negligent in forging documents that substantially damaged its own case against Firestone. As noted, Gibson Dunn also filed a counterclaim not presented to the jury for decision.

The Jury Verdict

The jury's task was divided into two parts: (1) the malpractice claim and (2) the damages claim based on Breezevale's case-within-a-case against Firestone. If the jury were to hold Gibson Dunn liable for legal malpractice, the measure of damages would be whatever Breezevale could prove against Firestone.[2]

As to the malpractice claim, the jury was asked to decide if Gibson Dunn breached the standard of care in its representation of Breezevale and, if so, if the breach proximately damaged Breezevale's case against Firestone. The jury answered "yes" to both questions (Questions 1 and 2) and thereupon went on to consider if forgeries had occurred with the participation of Breezevale executives. (Question 3). Their "yes" answer to this question necessarily had implications for the proximate cause issue (Question 2)[3] and was a predicate for Question 4 which asked if Breezevale's forgery of documents played a substantial part in damaging its case against Firestone. The jury answered "no" and thereupon proceeded to Breezevale's case-within-a-case against Firestone.

The jury was presented with three sets of claims Breezevale asserted against Firestone: (1) breach of contract in 1988 and 1989, (2) fraud in 1988 and 1989, and (3) promissory

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[2] Plaintiff also wanted the jury to decide, alternatively, if and in what amount Breezevale could have obtained a better settlement from Firestone than the $100,000 it accepted. The Court denied this request on the grounds that such an exercise would have been entirely too speculative.

[3] See Jury Instructions, pp. 16-17.

estoppel on the Nigerian tire factory project. The jury found: (1) for Breezevale on the contract claims, awarding $1.5 million for 1988 and $730,000 for 1989; (2) for Breezevale on the 1988 fraud claim, awarding the same $1.5 awarded under the 1988 contract claim, and for Firestone on the 1989 fraud claim;[4] and (3) for Breezevale in the amount of $1.2 million on the Nigerian tire factory claim. In all, the jury found that Breezevale proved $3,430,000 in damages caused by Firestone. This is the amount Breezevale would be entitled to receive in compensatory damages from Gibson Dunn.[5]

I. *The Rule 50 Motion for Judgment*

Gibson Dunn assert that Breezevale failed to establish that Stratton's conduct on October 14, 1991 in presenting Paul for deposition breached the applicable standard of care. Given the jury's finding that the offer letters (Def. Exs. 1-9) were forged with the participation of one or more Breezevale executives, Gibson Dunn also assert that Breezevale failed to prove Stratton's decision was the proximate cause of any damage to Breezevale's case against Firestone. Moreover, having forged the offer letters, Breezevale, according to Gibson Dunn, was contributorily negligent as a matter of law. Finally, Gibson Dunn assert that Breezevale failed to present legally sufficient evidence on both liability and damages in its case-within-a-case against Firestone. As to every claim and element, Gibson Dunn believe they are entitled to judgment as a matter of law.

A. Breach of the Standard of Care

The record is unequivocal that Stratton did not tell Habib or any other Breezevale executive of Paul's forgery allega-

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[4] The jury was instructed that the breach of contract and fraud claims were alternative theories of liability for which only one damage award could be made.

[5] The Court dismissed Breezevale's punitive damages claim against Gibson Dunn before the case was sent to the jury.

tions before he presented her to Jones Day for deposition on October 14, 1991. Nor is there any dispute he refused to stop Paul's deposition once it was underway, even though she had yet to make any damaging disclosures. Although Stratton claimed these were appropriate tactical decisions, there can be little doubt they implicated a lawyer's duties to disclose information and follow a client's instructions.

Two highly regarded law professors with extensive backgrounds in legal ethics testified on opposite sides of this crucial issue. Testifying for Breezevale, Professor Sherman Cohn concluded that Stratton's decisions were not permissible judgment calls but breached the standard of care and violated Rule 1.4 of the Rules of Professional Conduct requiring a lawyer to keep his client informed and to obtain consent for actions affecting the client's vital interests. Professor Thomas Morgan, testifying for Gibson Dunn, opined that Stratton's decision to present Paul for deposition was required by his obligation to Jones Day to have her available on the appointed day and, in any event, was a sound decision because postponement would have made no difference.

These polar-opposite views by noted experts do not lend themselves to judgment as a matter of law. Their vantage points differed, as did their view of the facts and their application of professional standards to those facts. It was clearly a question for the jury to decide if, on the facts and circumstances presented, Gibson Dunn had breached the standard of care. It would be as inappropriate now as it was at the close of Breezevale's case for the Court to substitute its judgment for the jury's on a factual issue fairly presented for jury decision. Gibson Dunn's motion for judgment on this issue must be denied.

B. Proximate Causation

If the offer letters were genuine, it would be relatively easy for Breezevale to demonstrate a causal relationship between

the destruction of its case against Firestone and Stratton's decision to present Paul for the damaging testimony he knew she would give at her deposition. On the other hand, if the offer letters were forged, the task of demonstrating a causal relationship would be difficult. Gibson Dunn's motions at trial for judgment on proximate cause were denied because the crucial question as to the status of the offer letters was still unanswered.[6]

The proximate cause issue is now before the Court in the context of the jury's finding the offer letters were forged.[7] Plaintiff makes a tortuous argument in its Memorandum in Opposition (at 12-13 & n.5) that one does not know from the jury's answer to Question 3 what documents were forged or which Breezevale executive(s) were involved. However, it is obvious from the issues tried to the jury and the instructions they were given that it was the offer letters and supporting spreadsheets with 1987 dates that were in question, and that it was Abou Jaoude and, perhaps, Habib and Awit who were the executives involved. The jury's answer to Question 3 is clear: Breezevale forged the offer letters.

Given this finding—which impliedly was also a finding that Paul told the truth about the forgeries—the burden was

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[6] Gibson Dunn's motions at trial for judgment and for dismissal of Breezevale's case were predicated on Gibson Dunn's belief the offer letters were forged and that the Court should so find as a matter of law. Inasmuch as the question of forgery was clearly for the jury, it would have been error for the Court to grant any of these motions. It is also important to note that the comments by the Court at the time the motions were denied were made in the context of Breezevale's claim the offer letters were genuine.

[7] The forgery finding was made on the basis of the preponderance of evidence standard. As discussed *infra* at 16-18, the Court decided at trial and reaffirms its decision here that it was appropriate for the jury to decide the factual question as to whether Breezevale forged documents by a preponderance of the evidence, rather than by clear and convincing evidence as requested by Breezevale.

upon Breezevale to demonstrate that postponing Paul's 10/14/91 deposition would have yielded a better result for Breezevale than its $100,000 settlement with Firestone. Putting it differently, Breezevale's burden was to show that Stratton's decision to proceed with the deposition proximately damaged Breezevale.

Inasmuch as postponement of Paul's deposition for purposes of investigation would only have validated her forgery allegations,[8] the answer to the question of proximate cause turns on whether .postponement of Paul's deposition would have led Jones Day and Firestone to follow a course of action different from the one they did. The only evidence relating to that issue came from Peter Glenn, Jones Day's lead counsel in the Firestone case, who testified that an unexplained request for a postponement would not only have "disappointed", "dismayed" and "upset" them, but would also have made them "suspicious" and "more inconsistent [sic] on getting Ms. Marr's [Paul's] deposition sooner than later." (Tr. at 4259). Glenn testified there was "not a chance in the world" Jones Day would have foregone taking Paul's deposition. (Tr. at 4260). Thus, Jones Day would inevitably have learned about the forgeries.

Breezevale offered no evidence—indeed, it could not—for the proposition that Jones Day and Firestone would have done anything differently vis a vis Breezevale's case had they taken Paul's deposition on a later date. Breezevale's arguments that Paul might have been dissuaded from telling her story if confronted with its inconsistencies (Opposition at

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[8] Millian's investigations during the week of Paul's deposition convinced him she was telling the truth. The jury had a chance not only to weigh Millian's conclusions, but also to consider the credibility of all the other witnesses, including experts called by both sides, who testified about the offer letters and spreadsheets. Neither side left any stone unturned on the forgery issue, so there can be no doubt the jury had all available information on which to make its finding.

16), or that delay might have enabled Breezevale to "fess up," clean up the discovery record and, thereby, head off Firestone's sanctions motion (Opposition at 16-17) do not rest on a factual foundation. Indeed, the first argument is entirely speculative and the second is squarely antithetical to Breezevale's hard-fought position throughout this trial that the offer letters were genuine.[9]

The Court's holding in *Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C. 1985) is directly on point:

> . . . even assuming negligence. . . . [T]he movant must show that his attorney's negligence caused a legally cognizable injury [citation omitted]. Although it is sufficient to show that the movant could have "fared better" in reaching the ultimate goal sought [citation omitted], or that there could have been a difference in the trial's outcome [citation omitted], more is required than speculation.

Because Breezevale was unable to demonstrate a causal relationship between Stratton's decision to present Paul for deposition and the inevitable destruction of its case against Firestone, Gibson Dunn are entitled to judgment on this element. Where, as here, there is no evidence to "support a rational finding of proximate cause," the question becomes one of law. District of Columbia v. Freeman, 477 A.2d 713, 716 (D.C. 1984).

C. Contributory Negligence

Given Breezevale's failure to present a prima facie case on proximate causation, there would be no predicate for a contributory negligence defense. However, considering the certain prospect this case will be appealed, it is appropriate for the Court to address the issue.

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[9] The Court fails to understand how Breezevale can now argue that the documents lacked "importance" (Memorandum of Opposition at 13).

Two threshold questions are presented: (1) Can the intentional act of forgery serve as the basis for a contributory negligence defense? (2) By what standard of proof—"preponderance" or "clear and convincing" evidence—must the forgery question be decided?

Breezevale argued at trial and again now that a contributory negligence defense does not lie where the conduct alleged is "fraud, not negligence." (Opposition at 42). As best the Court can discern the point, Breezevale appears to be arguing that only a negligent act, as distinguished from an intentional act, can serve as the basis for a contributory negligence defense. As a general proposition, that is clearly not so. *See District of Columbia v. Brown*, 589 A.2d 384, 385 (D.C. 1991). Moreover, when the concept of contributory negligence is properly analyzed, it is clear that intentional acts are embraced therein, as can readily be inferred from a comment made by PROSSER AND KEETON ON TORTS, §65 (5th Ed. 1984):

> It is perhaps unfortunate that contributory negligence is called negligence at all. "Contributory fault" would be a more descriptive term. Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty. . . .

The Restatement (Second) of Torts §466, adopted in this jurisdiction, defines contributory negligence as:

> either (a) an intentional or unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which

> the reasonable man should conform in order to protect himself from harm.

A person who forges documents for use in a lawsuit-can surely foresee that discovery of the forgery will harm his claim. It is conduct which falls squarely within Clause (b) of the Restatement's definition. In short, a contributory negligence defense based on forgery by Breezevale can properly be asserted in this case.

As to the applicable standard of proof, Breezevale argues that forgery, whether asserted as an affirmative claim or a contributory negligence defense, is a type of fraud that must be established by "clear and convincing" evidence in the District of Columbia. *E.g., Blake Construction Co. v. C.J. Coakley Co.*, 431 A.2d 559, 577 (D.C. 1981). Gibson Dunn counter that they are presenting a purely factual question (did Breezevale forge the offer letters?) which need only be answered by a preponderance of the evidence. The Court agreed at trial with Gibson Dunn's view and the jury was so instructed. For purposes of the record, the question is revisited here.[10]

Given the absence of a meaningful distinction between forgery and fraud, Breezevale makes a convincing point that forgery is provable by the same standard as fraud. In the usual scenario, an affirmative defense must be proven in accordance with standards applicable to the forum of the action. Thus, Gibson Dunn, in seeking to prove its contributory negligence defense, would be required to prove Breezevale forged documents by the clear and convincing standard.

But this is not the usual scenario inasmuch as we have two actions: Breezevale's suit against Gibson Dunn for legal

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[10] In preparation for the January 30, 1997 post-verdict hearing, the Court issued an Order advising the parties that argument would be limited to the standard of proof question. Both sides submitted additional memoranda in aid of their positions.

malpractice and Breezevale's case-within-a-case against Firestone, with D.C. law applicable to the former and Ohio law to the latter. A party suing in Ohio for damages based on fraud need only prove his claim by a preponderance. *Weiss v. Kearns*, 228 N.E.2d 331, 333 (Ohio 1967). Thus, the jury was instructed that Breezevale's fraud claims against Firestone in the case-within-a-case were to be decided by the preponderance standard. Gibson Dunn make a persuasive argument that it would be anomalous to require them to prove allegations of Breezevale's fraud on Firestone by the clear and convincing standard applicable in D.C., while Breezevale need only prove its claims of Firestone's fraud against it by the preponderance standard applicable in Ohio.

Furthermore, Gibson Dunn's contributory negligence claim does not allege that Breezevale defrauded them, but that Breezevale forged documents in its underlying action against Firestone. Thus, the Court must look to the case-within-a-case against Firestone to determine whether Breezevale, by forging documents, was itself responsible for destruction of its underlying case. Gibson Dunn's claim is integrally tied to the case-within-a-case, with Gibson Dunn effectively standing in Firestone's shoes on the forgery issue. Had Firestone chosen to defend or to counterclaim with allegations of Breezevale's fraud, it would only have had to prove its claim by a preponderance of the evidence. Therefore, since Gibson Dunn's claim that Breezevale forged documents in its underlying action is tied almost exclusively to the facts and issues in the case-within-a-case, Ohio law is applicable.

Despite some well-argued points and case authority for Breezevale's position, the Court remains persuaded, given the peculiar circumstances of the case-within-a-case aspect of this litigation, that its original decision should stand allowing Gibson Dunn to prove forgery by the preponderant evidence standard. The jury's finding that Breezevale forged the offer

letters is therefore a valid predicate for it to consider the contributory negligence issue.

One would expect the jury upon finding that Breezevale forged the offer letters also to find it thereby did substantial damage to its own case against Firestone. Indeed, there is no evidence to the contrary. Jones Day attorneys obviously believed Paul told the truth at her deposition[11] and immediately took steps to prepare a motion for sanctions, bringing all necessary pressure to bear to end the case. There can be no question on this record that the take-it-or.-leave-it $100,000 settlement offer Firestone finally made was a direct result of the forged documents.[12] Thus, no reasonable juror could have failed to conclude Breezevale was contributorily negligent. The Court therefore makes that finding as a matter of law.

D. The-Case-Within-a-Case Damage Findings

It was obviously Breezevale's burden to prove Firestone liable in damages for breach of contract and/or fraud on the 1988 and 1989 Iraqi tenders and for promissory estoppel on the Nigerian tire factory claim. Gibson Dunn argue that Breezevale's evidence as to liability on these claims was legally insufficient and that the evidence on damages was entirely too speculative for the jury to make awards. Given its finding that Breezevale failed to prove proximate causation against Gibson Dunn, the Court need not address these issues. However, as earlier noted, the strong likelihood of appeal makes it desirable for the Court to rule.

Breezevale's breach of contract and fraud claims against Firestone on the 1988 and 1989 Iraqi tender offers are predicated on the theory Breezevale had exclusive distributorship

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[11] See testimony of Peter Glenn. Tr. at 4261.

[12] Earlier, there had been settlement offers in the range of $3.5 million that Habib rejected.

agreements with Firestone during those years. Given that the only relevant written agreement between the parties (Pl. Ex. 22) covers the period from December 1, 1986 through November 30, 1988 and grants Breezevale nothing more than a non-exclusive distributorship in Iraq (Pl. Ex. 3), Breezevale had to prove the agreement was modified by a course of dealing that made it exclusive and extended it into 1989. Although the evidence was hardly impressive, there was arguably enough to present a question for the jury, at least as to the period covered in Breezevale's written agreement. The court is not inclined to disturb the finding.

1. The 1988 Iraqi Tender

Breezevale's lost profits claim on the 1988 Iraqi tender rests on its assertion that Breezevale should have had the distribution contract Firestone Spain executed with FOCOEX, an export trading organization established by the Spanish Government. Specifically, Breezevale maintains it was entitled in damages to profits it would have earned had the deal not gone to FOCOEX.

Breezevale's lost profits claim, however, rests on numerous unproven assertions and assumptions. The only evidence of an agreement between FOCOEX and Firestone Spain is an unsigned version (Pl. Ex. 164) lacking in any information as to how many tires FOCOEX was to buy and what prices it was to pay. Similarly, no evidence was presented as to how many tires FOCOEX actually sold to Iraq and what Iraq paid. In short, the record is devoid of facts from which anyone could calculate FOCOEX's profit margin, much less what Breezevale might have earned had it secured the same contract.

As with any large transaction of this kind, financing would be essential to its completion. Habib stated at trial that Breezevale could have obtained financing and purchased tires from Firestone Spain because "Breezevale Spain would

qualify under the same rules as FOCOEX," (Tr. at 471). However, this conclusory statement was unsupported by any evidence as to what these "rules" were and by what criteria Breezevale would qualify. In short, there was no evidence from which a fact finder could conclude Breezevale would have secured financing, let alone what it would have cost. Absent some proof that Breezevale could have obtained financing for the 1988 Iraqi tender, any claim of lost profits is speculative.

Breezevale cites to *A.F.G. Inc. v. Great Lakes Heat Treating Co., Treating Co.*, 555 N.E.2d 634 (1990) and *Charles R. Combs Charles R. Combs Trucking Co., Inc. v. International Harvester Co.*, 466 N.E.2d 883 (1984) for the proposition it met the standards under Ohio law for proving lost profits.[13] However, as Gibson Dunn convincingly argue,[14] given the volatile and fluctuating nature of trade with Iraq,[15] Breezevale would have had to present substantially better evidence on lost profits than it did to meet the standard articulated by the Supreme Court of Ohio in *AFG Inc.* Quoting from Restatement (Second) of Contracts §352, cmt. b, the Ohio Court noted:

> The difficulty of proving lost profits varies greatly with the nature of the transaction. . . . *[I]f the business is a new one or if it is a speculative one that is subject to great fluctuations in volume, costs or prices, proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert*

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[13] Plaintiff's Opposition at 32.

[14] Defendants' Reply at 16-17.

[15] Habib himself testified at trial that financing rates could vary from "25 to 50 percent, depending on the day," (Tr. at 416). "You couldn't have finance today, but maybe two months later, one month later, you can have finance. The market, because of the war, was so volatile, that one day, they were good and one day they weren't good." (Tr. at 419)

> *testimony, economic and financial data, market surveys and analyses, business records of similar enterprises and the like.* [Emphasis of Ohio Supreme Court.]

Id. at 638. Significantly, Breezevale presented no expert testimony, financial data, business records from FOCOEX, or other evidence from which lost profits could "be shown with reasonable certainty." *Combs Trucking*, 466 N.E.2d at 887. The testimony of Dr. Jonathan Walker, Gibson Dunn's economic expert, as to the impossibility of calculating lost profits from Breezevale's evidence stands uncontradicted. The jury's $1.5 million verdict on the 1988 Iraqi Tender finds no support in the record and must therefore be vacated.[16]

2. The 1989 Iraqi Tender

As noted, Breezevale's last distributorship agreement with Firestone (Pl. Ex. 22) ended on November 30, 1988 and provided by its terms that it could not be renewed or extended by the parties (Pl. Ex. 22, ¶ 12.2) and that any relationship between the parties after its end "shall be the subject of a new agreement." (Pl. Ex. 22, 12.3) Attempts to negotiate a follow-on agreement failed. Breezevale was therefore in the difficult position of having to demonstrate by a course of dealing between Breezevale and Firestone that the terms set forth in the '86-'88 agreement did not mean what they said. In other words, Breezevale would have to show—as the Court permitted it to do—that Firestone treated Breezevale during 1989 as its exclusive distributor of tires to Iraq.

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[16] Breezevale argues as a fallback that the $1.5 million the jury awarded represents a 5% commission on the FOCOEX deal. (Opposition at 34). However, no competent evidence was ever presented as to the amount of the FOCOEX-Firestone deal and, thus, the jury had no figure on which to base a commission. Moreover, no evidence was presented that Firestone ever gave Breezevale a commission or had made an agreement to do so.

Breezevale cites to internal Firestone documents from the first three months of 1989 wherein Breezevale is referred to as Firestone's distributor. (Pl. Exs. 47, 48A, 53, 56, 58A, and 62). However, actual dealings between the parties are to the contrary. Firestone was working with FOCOEX on the 1989 tender (Pl. Ex. 59) and, in Breezevale's view, was being most uncooperative and unresponsive in providing meaningful quotes on Iraqi requests for sales offers. (Pl. Exs. 67, 70, 71A, and 76). This is so obviously a course of dealing from which one can only conclude that Firestone was not treating Breezevale as its exclusive distributor. Yet, Breezevale cites it as evidence for the existence of an exclusive contract while, at the same time, relying upon it as evidence of breach. No reasonable juror could find on this record that Firestone had an exclusive distribution agreement with Breezevale in 1989. Thus, there can be no breach and the jury's $730,000 verdict on this claim must be vacated.

3. The Nigerian Tire Factory

The only evidence on damages as to Breezevale's Nigerian tire factory claim was Habib's testimony that he spent "about one million 200,000 dollars" on the tire plant project (Tr. at 317). Unlike "lost profit" claims which may be difficult to pin down, an accounting of actual expenditures is easily proved. However, not a shred of documentation and no testimony by other witnesses was presented to back up Habib's statement. Absent some independent corroboration, there would be no way for a jury to determine if Habib's conclusory assertion is based on fact. In analogous circumstances, Ohio courts have rejected unsubstantiated damage awards. *See Endersby v. Schnepps*, 596 N.E.2d 1081, 1084 (Ohio App. 3 Dist. 1991).[17] There being no factual basis for the jury's $1.2 million award on the Nigerian tire factory claim, their verdict on this claim must be vacated as a matter of law.

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[17] D.C. decisions are consistent with Ohio caselaw. *See Bedell v. Inver Housing, Inc.*, 506 A.2d 202, 205-06 (D.C. 1986).

II. *The Rule 59 Motion for New Trial*

Gibson Dunn move in the alternative that the Court grant a new trial. Because Gibson Dunn are entitled to judgment as a matter of law, it follows they are also entitled to a new trial because the jury's verdict is against the clear weight of the evidence.

ORDER

Wherefore, in view of the foregoing analysis, it is on this 1st day of May, 1997

ORDERED that Gibson Dunn's Motion for Judgment pursuant to Sup. Ct. Civ. R. 50 is GRANTED. It is further

ORDERED that Gibson Dunn's alternative Motion for New Trial pursuant to Sup. Ct. Civ R. 59 is also GRANTED.

/s/ Steffen W. Graae
STEFFEN W. GRAAE
Associate Judge

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APPENDIX G

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

[Filed May 2, 1997]

94-CA-10818
Judge Steffen W. Graae
Calendar No. 4

BREEZEVALE LIMITED,

Plaintiff,

v.

TIMOTHY DICKINSON, ESQ., *et al.*,

Defendants.

MEMORANDUM ORDER ON DEFENDANTS' COUNTERCLAIM

Before the Court is Gibson Dunn's Counterclaim, triable to the bench because it involves equitable issues of bad faith litigation and attorneys' fees.[1] Gibson Dunn ask the Court to follow the jury's finding that Breezevale forged documents and to award them judgment on the counterclaim, subject to proof on damages. This would be the normal course where the jury decides a factual issue common to both legal and equitable claims.[2] However, the jury decided the forgery issue on the basis of the "preponderance of evidence"

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[1] The Court is issuing contemporaneously herewith a Memorandum Order granting Gibson Dunn judgment and, in the alternative, a new trial on the legal claims Breezevale tried to a jury.

[2] Where, as here, a factual issue—i.e. forgery of documents—common to both the legal and equitable claims is decided by the jury, the Court is bound by the jury's factual determination when deciding the equitable claim. *Lewis v. Sears Roebuck & Co.*, 845 F.2d 624, 629-30 (6th Cir. 1987).

standard, whereas it appears the factual predicate for a finding of bad faith litigation must be established by "clear and convincing" evidence. Thus, if the higher standard of proof applies, then the basis for the jury's finding is inadequate and the Court must independently decide if the jury's finding was also proved by the "clear and convincing" standard.[3]

A. *The Applicable Standard of Proof*

Gibson Dunn argued vigorously that they need only prove their bad faith litigation claim by a preponderance of the evidence and cite *Goffe v. Pickard*, 588 A.2d 265 (D.C. 1991), (*Goffe I*) for that proposition. In *Goffe I*, the Court affirmed the trial judge's finding of bad faith litigation but made no reference to the standard of proof he applied. In a subsequent opinion involving the disbarment of Mr. Goffe for a pattern of misconduct which included the subject matter of his suit with Pickard, the appellate court observed in a footnote that the trial judge in *Goffe I* had applied the preponderant evidence standard. *In re: Goffe*, 641 A.2d 458, 462 n.4 (D.C. 1994) (*Goffe II*). Reading the two cases together, Gibson Dunn assert that our appellate court has held that proof by a preponderance is sufficient to establish bad faith litigation.

The Court is unpersuaded. First, there is no indication in the *Goffe I* opinion that the appellant ever raised the "standard of proof" issue. Second, the Court of Appeals, in fact, makes reference in *Goffe I* to a "heavy burden" of proof:

> [T]he "bad faith" exception to the American Rule is reserved for extraordinary cases, *Launay v. Launay, Inc.*, 497 A.2d 443, 450 (D.C. 1985), and ". . . a party alleging that an action has been . . . litigated in bad faith" bears a

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[3] The Court has found no authority suggesting it cannot subject a jury's factual finding to a higher standard of proof when required to establish an equitable claim.

"heavy burden" of proof. *Schlank v. Williams*, 572 A.2d 101, 111 (D.C. 1990).

Id. at 271.

The American Rule, of course, is that parties are responsible for their own counsel fees. Fees may be shifted only pursuant to statute or to the narrowly-drawn "bad faith litigation" exception. Reviewing the nature and history of the exception, our Court of Appeals observed in an earlier decision that the underlying rationale is punitive, so "the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts" and may award fees "only in the presence of extraordinary circumstances or when dominating reasons of fairness so demand." Thus, "the standards of bad faith are necessarily stringent [citation omitted]." *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 27, 37 (D.C. 1986). It is obvious the Court's references to "heavy burden" in *Goffe I* and "stringent standards" in *Synanon* mean that a party alleging bad faith litigation must establish its claim by "clear and convincing" evidence.[4]

B. *The Forgery Scheme as Described by Rebecca Paul*

The essence of Rebecca Paul's account is that she was directed by Breezevale executives to prepare in 1991 spreadsheets and offer letters responsive to requests made by Iraq in 1987 for quotes on Firestone tires. She testified that, as she was organizing files and materials relevant to the Breezevale-Firestone litigation in the summer of 1990, she mentioned to Mr. Habib there were no offers made to Iraq in 1987, to which he responded: "We better think about making sure there is." (PaulDep. at 225-226).[5] She also testified that

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[4] See also the D.C. Circuit Court's convincing analysis of the same issue in *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1476-80 (D.C. Cir. 1995).

[5] Paul testified at trial by video deposition. Page references are to the typed transcription.

Joseph Abou Jaoude and Charles Awit had several "animated" conversations in her presence in early 1991 when they decided to "make offers up" so it would appear Breezevale had been promoting Firestone business in Iraq during 1987. (Paul Dep. at 216-222).

According to Paul, she and Abou Jaoude worked together on the forgeries for two to three days in February 1991. They selected Iraqi requests for tire quotes from Breezevale's 1987 files, whereupon she worked up spreadsheets on her computer from which Abou Jaoude made handwritten versions (Def. Exs. 21, 22, 23, 24, and 25) on which to base back-dated offer letters.[6] A number of draft offer letters were prepared and some were signed by Abou Jaoude, but the entire batch was not going to be ready by the time he had to return to Beirut. According to Paul, Abou Jaoude thereupon signed his name eight times on a piece of paper (Def. Ex. 10), with the understanding she would cut them out, paste them on the offer letters when ready, and then make clean photocopies. (Paul Dep. at 391-94). However, this was never done because Abou Jaoude, at Habib's instruction (Paul Dep. at 633), took the draft offer letters to Beirut, where finals were made on Breezevale's Beirut letterhead and copies (Def. Exs. 1, 2, 3, 4, 5, 6, 7, 8, and 9) returned to London's Breezevale offices at the end of February (Def. Ex. 142A) for delivery to Gibson Dunn for disclosure to Firestone in discovery. (Def. Ex. 180).

C. *Breezevale's Account*

Joseph Abou Jaoude testified that he prepared the spreadsheets and offer letters in Beirut on the 1987 dates marked

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[6] Breezevale did not own computers until May 22-, 1987 and apparently did not use them for preparing spreadsheets until January 1988. (Paul Dep. at 290). Thus, in order to make the 1987 offers appear authentic, handwritten spreadsheets were prepared (although calculations had been done on computer) and placed in the 1987 files. (Paul Dep. at 310-311; 322-324).

thereon (Tr. at 2425-26; 2444-45) and had them hand-delivered to Iraqi officials in Baghdad by a Mr. Jebbouri (Tr. at 2453). Thus, Abou Jaoude and Breezevale took the position that Paul's account of how the spreadsheets and offer letters came into being was a complete fabrication. The Breezevale version, as will become readily apparent, does not stand up to even casual scrutiny.

D. *The Evidence*

Gibson Dunn launched a multi-pronged assault on Breezevale's denial of forgery, presenting evidence ranging from the commonsensical to the sophisticated. The Court will analyze the evidence in roughly that order of progression.

1. *Credibility of Rebecca Paul*

Breezevale asserts that Paul, an employee of ten years whom Habib had no reason to distrust (Tr. at 785-786), invented an elaborate scheme of false testimony to sabotage the company. However, no evidence was presented from which one could speculate she had a motive for doing so. Moreover, it is difficult, if not impossible, to believe she would invent a story so deeply implicating herself in serious misconduct and so rich in odd detail.

Paul testified that she became increasingly concerned as the October 14, 1991 date for her deposition approached and on four occasions (the last being on October 11, 1991) told Mr. Habib she was afraid of having to testify falsely under oath (Paul Dep. at 426-40). On that last occasion, Habib told her not to be nervous and that she could probably "outsmart them." Evidence that she was going through a crisis of conscience was corroborated by John Millian who testified to her tearful confession of the forgery scheme the night before she was to be deposed. His assessment of her veracity—both as to the manner in which she gave her account and the detail she provided—finds ample support in other evidence.

2. *No Reason for Breezevale to do business with Iraq from Beirut*

There would be no good reason for Breezevale to conduct its business with Iraq in 1987 by hand-delivering offer letters from its Beirut office. All of Iraq's requests for offers in 1987 were Telexed to the London office (see Def. Exs. 63, 70, 79, 93, 97-99, 102-03, and 106-07), as Abou Jaoude conceded (Tr. at 2679). Since there were no difficulties with Telex communications between London and Baghdad in 1987 (see Abou Jaoude's testimony at Tr. 2686), it would defy common sense and good business practice to hand deliver offer letters from Beirut when instant and far more reliable communication was available via London.

Charles Cook, a London-based Breezevale employee in 1987, testified that Breezevale-Iraq business was handled out of London and that he had no knowledge of any 1987 offers made to Iraq through the Beirut office. (Cook Dep. at 52-53, 57-59). Cook's testimony, ironically, was corroborated by Abou Jaoude himself on January 26, 1991 when he responded as follows to a request from the London office for information about Breezevale's business reputation in Iraq: *"[S]ince I started with Iraq's affairs by the last quarter of 1988*, it is preferable to have these [sic] information from Charles [Awit]." (Emphasis added) (Def. Ex. 153). After February 1991, when Abou Jaoude arguably had a motive to lie, he testified that he handled Breezevale's Iraq business from Beirut beginning in 1985 (1995 Dep., Tr. at 2420-22) or beginning in late-1986 or early 1987 (Tr. at 2644-45), while Habib testified that Abou Jaoude assumed responsibility at the end of 1986 (Tr. at 768). These inconsistencies aside, no one else has any recollection that Abou Jaoude was responsible for Iraq business matters in 1987 (Cook Dep. at

74; Breezevale consultant Peter Taylor, Tr. at 5663; Paul Dep. at 56-57).[7]

3. *No Corroboration that Offer Letters were Typed in 1987*

Joseph Abou Jaoude is the only witness who testified to seeing the offer letters in 1987. Neither Habib (Tr. at 664-68) nor Awit (Tr. at 3469) saw the letters before 1991. Two witnesses who arguably could have corroborated Abou Jaoude's testimony were his secretary, Ms. Khoury, who allegedly typed them, and Mr. Jebbouri, who allegedly delivered them to Baghdad, but neither was called to give evidence. Similarly, neither the typewriter on which the offer letters were purportedly typed in 1987, nor any other documents typed on that machine were ever produced for inspection. (*See* Plaintiff's Supplemental Responses to Defendant Stratton's Second Set of Interrogatories, dated May 16, 1996).

It is puzzling that Abou Jaoude never signed any Firestone-related offer letters to Iraq before or after 1987 if, indeed, he was responsible for that business beginning in 1985. Similarly, it is difficult to fathom, if offer letters were prepared in

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[7] Breezevale argued that the "History of Dealing with Unfreso Iraq in 1987" (Pl. Ex. 467) was legitimately prepared by Paul in 1987 or 1988 and conclusively shows that Breezevale Beirut was handling Iraq business, as evidenced by the following reference under "Remarks": "B' VALE BEIRUT MANAGEMENT VISITED ITC TO TRY AND SORT OUT A DEAL LOCALLY." (Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Dismissal and other Sanctions at 12-14). Given Abou Jaoude's testimony that he never went to Iraq in 1987 (Tr. at 2655), it is not clear to whom the remark applies or whether the visit, in fact, took place in 1987, if it took place at all. If, as Breezevale asserts, Pl. Ex. 467 was legitimately prepared "to show the volume of business that we were trying to push through with Firestone" (Paul Dep. at 664), it defies belief that the column "Date of B'vale Reply" would be left blank as to each Iraqi inquiry if, in fact, offer letters had been sent out in 1987. If anything, Pl. Ex. 467 tends to undermine Breezevale's claim.

1987, why copies never found their way into Breezevale's London office where all the Telexes and other records pertaining to its Iraq business were maintained. They first appeared in London at the end of February 1991,[8] as is consistent with Paul's description of the forgery scheme.

4. *Computer Record Corroboration of Paul's Testimony*

Before it became computerized in mid-1987, Breezevale's normal practice in responding to an Iraqi Telexed request for tire quotes was to give it a file designation (e.g., EH 694), obtain quotes from Firestone, secure financing, and then prepare a hand-written spreadsheet setting out unit costs, shipping costs, sales price, profit margin, etc., from which a Telex letter could then be prepared making a formal sales offer. Obviously, once Breezevale computerized, preparation of these spreadsheets and related offer letters became much quicker and easier.

Paul testified that when she and Abou Jaoude forged the offer letters in February 1991, she took advantage of the computer's spreadsheet capabilities, whereupon they would make handwritten versions consistent with Breezevale's practice before computerization (Paul Dep. at 322). She testified

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[8] Breezevale makes too much of John Millian's Rule 11 Memorandum of July 1990 wherein he states "we also have a copy of a quotation submitted to Iraq," with apparent reference to the November and December 1987 quotes. Breezevale cites it as proof there was at least one offer letter in existence in London before February 1991 and that Gibson Dunn had it. However, it is clear to the Court that Millian may have made an innocent misstatement. It is inconsistent with his faxed request for information about the November and December 1987 offers and Breezevale's June 26, 1990 response (Def. Ex. 281) which does not provide copies of any offers, but two figures ($102,156,255.95 and $39,636,116.80) which do not correspond with the figures on Def. Exs. 3-9. Breezevale offered no proof copies of the offer letters were in London before the end of February 1991 or that Gibson Dunn had any copies before they were forwarded to Millian on March 7, 1991 (Def. Ex. 180).

to making the handwritten spreadsheet herself for EH 694[9] (Def. Ex. 20) used for the November 18, 1987 offer letter (Def. Ex. 3), and to Abou Jaoude making the handwritten spreadsheets for EH 705 (Def. Ex. 21) used for the first December 10, 1987 offer letter (Def. Ex. 5), for EH 706 (Def. Ex. 22) used for the second December 10, 1987 offer letter (Def. Ex. 6), for EH 707 (Def. Ex. 23) used for the third December 10, 1987 offer letter (Def. Ex. 7), for EH 708 (Def. Ex. 24) used for the fourth December 10, 1987 offer letter (Def. Ex. 8), and for EH 721 (Def. Ex. 25) used for the December 17, 1987 offer letter (Def. Ex. 9). Computerized counterparts for these spreadsheets and/or offer letter drafts were located in Paul's computer files under last access dates of February 20, 21, and 22, 1991 (Def. Ex. 133 B), thus corroborating critical elements of her testimony.

A more detailed look at some of the documents in evidence leads to the inescapable conclusion the offer letters were forged. Def. Ex. 13 is a computer-generated draft of an offer letter dated February 25, 1987, several months before Breezevale purchased computers. Inasmuch as Abou Jaoude admitted (Tr. at 2472-73) to having made some handwritten corrections on Def. Ex. 13 (*i.e.*, "Tyres Division" and "London Ref. EH 616") that were ultimately reflected on Def. Ex. 2 (the final version purportedly hand-delivered to Baghdad), logic suggests Def. Ex. 2 was derived from Def. Ex. 13, meaning it could not have been prepared in February of 1987.

At first, Breezevale took the position in discovery that Def. Ex. 13 was one of Paul's fabricated documents.[10] However, once it was admitted that Abou Jaoude had made notations on it, Breezevale then claimed that Def. Ex. 13 was legitimately

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[9] The "EH 964" notation at the top of Def. Ex. 20 is clearly a transposition error.

[10] *See* Plaintiff's Responses to Defendant Howell's First Set of Interrogatories, Interrogatory 11.

prepared *from* Def. Ex. 2 once Breezevale computerized and that Abou Jaoude made the corrections on Def. Ex. 13 when he happened to be looking through the file, long after the offer letter had purportedly been sent. (Tr. at 2473-74). Aside from this explanation defying common sense, John Jessen, Gibson Dunn's computer evidence expert, conclusively proved that Def. Ex. 2 was derived from Def. Ex. 13 which, in turn, could only have been derived from a computerized spreadsheet last accessed on February 21, 1991.[11] Thus, Def. Ex. 2 is a forgery.

The evidence as to Def. Ex. 14, although it pertains to an offer letter dated November 18, 1987 (Def. Ex. 3), is similar to the evidence on Def. Ex. 13. Breezevale at first claimed it was fabricated by Paul, but because it has on it Abou Jaoude's handwritten notations, he testified at trial to having it with-him in Beirut in 1987 when he prepared the November 18 offer letter (Tr. at 2477-78; 2834-37). However, the document can be found on Paul's computer with a last access date of February 21, 1991, thus corroborating her testimony. (See Def. Ex. 133 B; Pl. Ex. 619 at GDC 002225).

5. *Defendants' Exhibits 11, 12 and 10*

Paul testified to the haste with which she and Abou Jaoude sought to complete the spreadsheets and offer letters before his return to Beirut (Paul Dep. at 308; 395). In looking for appropriate letterheads on which to type offer letters, Paul mistakenly chose one, that did not exist before 1988[12] and

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[11] Both sides also presented expert testimony on ink dating in an attempt to demonstrate when Abou Jaoude made his notations on Def. Ex. 13 and various other documents in the case. The Court is unpersuaded that either expert had a sound basis for the opinions he rendered and, thus, does not rely on this evidence for its findings.

[12] "Breezevale Incorporated" with a Woodbridge, New Jersey address seen at the bottom right on the letterhead was not established until sometime in 1988.

typed onto it one of the February 25, 1987 offers (Def. Ex. 11) and one of the December 10, 1987 offers (Def. Ex. 12) and had Abou Jaoude sign them (Paul Dep. at 327-338). Ultimately, the error was discovered and Def. Exs. 11 and 12 were not used.

When confronted with Def. Exs. 11 and 12, Abou Jaoude denied having signed them (Tr. at 2471-72). He also denied signing his name eight times on Def. Ex. 10 (Tr. at 2470). Handwriting experts for both sides were called to compare the admitted signatures on Def. Exs. 1-9 with those on Def. Exs. 10, 11, and 12. Gibson Dunn's expert, Edwin Alford—former Chief Document Examiner of the U.S. Secret Service—clearly had the better of it. Using blow-ups (*e.g.*, Def. Ex. 600) from which he demonstrated how these signatures were made and how minor variations normally occurred, Alford concluded "with no reservation whatsoever" that they were done by the same person. (Tr. at 5478-5484). By contrast, Donald Vacca—plaintiff's uncertified document examiner from Evergreen, Colorado—offered an incoherent analysis of the signatures, concluding on direct examination that Abou Jaoude "probably" did not sign Def. Exs. 10, 11, and 12 (Tr. at 5862), but then conceded on cross that the person who signed Def. Exs. 3, 5, and 9 could also have signed Def. Ex. 10. (Tr. at 6007-39).[13] In the final analysis, evidence that Abou Jaoude in fact signed the questioned documents was clear and convincing, further corroborating Paul's description of the forgery scheme.

6. *Abou Jaoude's Verification*

Abou Jaoude testified to making three trips to Baghdad—one in May 1993, another in November 1994, and a third in February, 1995—to obtain verification that the offer letters he

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[13] In closing argument, John Sharer aptly characterized Vacca's incomprehensible attempts to distinguish essentially indistinguishable signatures as "silly testimony."

testified to preparing in 1987 were received by Iraqi officials in that year. On the first trip, he came back with Pl. Exs. 185 A-I,[14] copies of the offer letters he said were date-stamped by Iraqi officials.[15] (Voir Dire, Tr. at 2545-46). As to the second trip, he testified to presenting a letter with accompanying chart (Pl. Ex. 157 A-B), requesting confirmation from the General Establishment for Rubber Industries that the nine offers, specifically identified on the chart, were delivered in 1987. (Tr. At 2561-62). Two weeks later, he was given a letter (Pl. Ex. 157 C) confirming the offers had been made, but not when they had been received and without the necessary authentication. He therefore returned to Baghdad in February of 1995 with Pl. Ex. 157 C to have the signature on it certified by the Ministry of Industry, the Foreign Ministry, and the American Interests Section of the Polish Embassy (Pl. Ex. 157 D).[16]

There are a number of troubling aspects to Pl. Exs. 185 A-I. Abou Jaoude testified he did not bring copies of the offer letters to Baghdad in May 1993 and, thus, Pl. Exs. 185 A-I

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[14] Pl. Exs. 185 A, B, C, D, E, F, G, H, and I correspond in order to Def. Exs. 1, 2, 3, 4, 5, 6, 7, 8, and 9.

[15] Because these documents lacked authentication, they could not be admitted for their truth. However, they were admitted as corroboration that Abou Jaoude went to Iraq in 1993 and for purposes of defense cross-examination on his version of events.

[16] Pl. Ex. 157 C (and translation) was admitted into evidence as a document authenticated in accordance with SCR Rule 44(a)(2). However, the Court found admissibility a close question given that the document was, strictly speaking, *not* an official foreign record, but a letter response to an inquiry about what could, at best, be considered a business record. There were, of course, no witnesses who could testify to Iraqi business record-keeping practices in order to lay a proper foundation for admission. The Court opted for admission, looking to common sense indicia of trustworthiness—including the fact that the dates on the offer letters were not provided in the chart (Pl. Ex. 157 B) but were noted in the Iraqi letter (Pl. Ex. 157 C). Tr. at 2755-2762.

are copies with original date stamps he said he received from Iraqi officials. (Tr. at 2546-48; 3039). Edwin Alford testified that Pl. Exs. 185 A-I have copymachine "trash marks" identical to the offer letters in Breezevale files, thus proving they could not have been made from originals (Tr. at 5480-70, 5540-51). This sharply contradicts Abou Jaoude's earliest testimony about the offer letters, wherein he unequivocally stated that he sent Mr. Jebbouri to Baghdad with only signed originals and no copies. (Abou Jaoude April 1995 Dep., Vol. 3 at 392, shown at trial at Tr. at 3040-41). A year later, Abou Jaoude testified that he sent Jebbouri off with originals and four copies (Abou Jaoude March 1996 Dep. at Vol. 2 at 218-19, shown at trial at 3046).[17] At trial, Abou Jaoude came up with yet a third version, testifying that after his secretary typed an offer letter, she would photocopy a corrected version for his signature from which copies would then be made for delivery to Baghdad (Tr. at 2450-51; 3038-3069A).

Although no official translation was provided for the date stamps on Pl. Exs. 185 A-I, Abou Jaoude testified they were identical, except for the dates, and showed receipt by the "General Establishment (or Company) for Shopping Center." (Tr. at 3080). Two things are puzzling about this: (1) Pl. Exs. 185 A and B are addressed to "ISOI, Iraimports Tyres Division, Al Masbah Street, 1st Floor, Baghdad" and Pl. Exs. 185 C through I are addressed to "Iraqi Trading State Establishment, POB: 17, Baghdad," while the date stamp on all of them identifies yet a third entity, the General Establishment for Shopping Center. (2) A Telex communication from Iraq to all potential suppliers dated September 17, 1988 advises that the Iraqi Trading State Company merged on

[17] Between April 1995 and March 1996, Gibson Dunn advised Breezevale in their 26(b)(4) statement what Mr. Alford would say about the "trash marks" on Pl. Exs. 185 A-I. Gibson Dunn make the plausible argument that Abou Jaoude, although he denies it, changed his testimony in 1996 in response to Alford's proffered opinion.

September 9, 1988 with the State Company for Shopping Center and that, henceforth, all future transactions would be under the latter name. (Def. Ex. 577). Thus, it would appear the date stamps could not have been put on Pl. Exs. 185 A-I until sometime after September 9, 1988. These discrepancies, together with Abou Jaoude's inconsistent and uncorroborated accounts as to whether original offer letters, only copies thereof, or both, were delivered to Baghdad, cast serious doubt on the legitimacy of the documents and Abou Jaoude's testimony as to how he obtained them.

If Pl. Exs. 185 A-I were legitimate, they would arguably be the best evidence possible to prove Abou Jaoude's claim the offer letters were delivered in 1987. It is telling that he did not bring these documents back to Iraq for authentication, but instead prepared a new request (Pl. Ex. 157 A-B) asking for a much lower order of proof, namely a letter in response. The reply he received—Pl. Ex. 157 C—does not answer the crucial question as to when the offer letters were received and by whom. It is not inconceivable, given Abou Jaoude's history of changeable testimony and proven falsehoods, that he could have presented Iraqi authorities with the offer letters in 1993 when he was there in May, or at some other time after they were prepared in 1991. Considering Pl. Ex. 157 C in the context of all the other evidence in this case, the Court believes it is entitled to very little weight.

CONCLUSION

Factually, this case was extraordinarily complex, with numerous claims and issues played out at trial to the bitter end. The Court has not dealt with every issue raised, but has focused on the evidence directly relevant to the core question presented by the case: Did Breezevale forge offer letters in February of 1991 and thereupon litigate in bad faith? The Court has no difficulty in concluding the evidence clearly and convincingly compels an affirmative answer to the question.

Joseph Abou Jaoude, with the knowledge of Charles Awit and approval of Habib Habib, undertook in February 1991 to boost Breezevale's case against. Firestone by creating a false 1987 record of business activity on Firestone's behalf. Once the fraud was disclosed and Breezevale's case against Firestone destroyed, Breezevale executives, rather than accept the outcome, chose to sue their lawyers for legal malpractice, asserting the documents at issue were genuine, yet knowing them to be false.

It is difficult to envision a clearer case of bad faith litigation. Not only did Breezevale make Gibson Dunn lawyers unwitting accomplices in its attempted fraud on Firestone when it created the forged documents and delivered them for discovery, but it then sought to punish Gibson Dunn for its own misconduct. The cost to Gibson Dunn has been enormous. The cost to this Court and to the citizens of the District of Columbia, although obviously not as great, is also considerable. While the city may not be able to recoup, Gibson Dunn can.

Wherefore, the Court finds by clear and convincing evidence that Breezevale's complaint against Gibson Dunn was filed and prosecuted in bad faith and that Gibson Dunn shall have judgment on Count I of their Counterclaim, subject to proof of damages.

It is so ORDERED this 1st day of May, 1997. It is further ORDERED that the parties shall schedule a further hearing on Gibson Dunn's Counterclaim.

/s/ Steffen W. Graae
STEFFEN W.GRAAE
Associate Judge

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APPENDIX H

09/09/96 TRANSCRIPT
PAGES 6-11

* * * *

STAMPED DOCUMENTS AND THE REBECCA PAUL 1991 DEPOSITION EXHIBITS ARE THE EXHIBITS WE INTEND TO USE. I WOULD REQUEST THE COURT ENSURE IF IT COULD THAT BREEZEVALE, BRING THOSE DOCUMENTS TO COURT SO WE MAY USE THEM DURING THE COURSE OF THE TRIAL AS WE PROCEED.

THE COURT: I ASSUME YOU WILL DO THAT.

MR. SHARFMAN: CERTAINLY, FOR PURPOSES OF INTRODUCTION OF EVIDENCE IN THE COURTROOM, OF COURSE.

MR. BOUTROUS: THANK YOU.

THE COURT: COUNSEL, I WANT TO REVISIT WITH YOU ONE ISSUE THAT I KNOW THAT I HAD RULED ON WHEN WE HAD THE PRETRIAL, AND THAT WAS THE ISSUE OF PERMITTING THE DEFENDANTS TO RAISE IN FRONT OF THE JURY IN OPENING STATEMENT, AND I SUPPOSE IN VOIR DIRE, THE FACT THAT THEY HAVE COUNTERCLAIMS IN THIS CASE.

ON FURTHER REFLECTION ON THAT, IT SEEMS TO ME THAT NO USEFUL PURPOSE WOULD BE SERVED BY ALLOWING YOU TO DO THAT. IN FACT, I THINK IT WOULD CREATE SOME CONFUSION IN THE MINDS OF THE JURORS BECAUSE, IN EFFECT, WE WOULD BE TELLING THEM ABOUT SOMETHING THAT THEY ARE NOT GOING TO BE DECIDING.

THOSE, ARE CLEARLY ISSUES THAT ARE GOING TO BE BENCH TRIABLE ISSUES, AND IT SEEMS TO

ME THAT NOTHING USEFUL IS GAINED AND, INDEED, ONLY CONFUSION WILL RESULT FROM ALLOWING THEM TO KNOW ABOUT THE EXISTENCE OF THE COUNTERCLAIMS.

THE DEFENDANTS, OF COURSE, ARE GOING TO BE ABSOLUTELY FREE TO—AS I EXPECT THEM TO DO, WHICH IS TO TELL THE JURY ABOUT THEIR DEFENSES AND CLAIM THAT THEY DON'T BELIEVE THIS IS A VALID LAWSUIT AND THE LIKE.

MY THINKING NOW AT THIS POINT IS THAT IT WILL—IT WILL REALLY ONLY CREATE CONFUSION. IT'S NOT SO MUCH FROM THE POINT OF VIEW RAISED BY MR. SHARFMAN THAT THE PLAINTIFFS WOULD BE PREJUDICED BY IT, BUT RATHER THAT TO TELL THE JURY ABOUT CLAIMS THAT THEY ARE NOT GOING TO BE INVOLVED IN IS ONLY GOING TO, I THINK, LEAD TO SOME SPECULATION ON THEIR PART AND SOME CONFUSION. THAT WON'T BE HELPFUL. THOSE ARE MY THOUGHTS ON THAT.

MR. BOUTROUS: MAY I ADDRESS THAT?

THE COURT: YES.

MR. BOUTROUS: IT HAS BEEN OUR POSITION—AND I UNDERSTOOD THE COURT TO HAVE RULED—THAT THE JURY WOULD BE PERMITTED TO CONSIDER ISSUES CONCERNING THE PWAP LITIGATION, INCLUDING PUNITIVE DAMAGES, IF THE COURT ALLOWS AND DETERMINES THAT WE MAY SHOW—MAY JUSTIFY PUNITIVE DAMAGES.

I KNOW THE COURT HAD RULED THAT WE WOULDN'T BE ALLOWED TO REFER TO PUNITIVE DAMAGES, BUT I THINK THAT, AS I UNDERSTAND THE COURT, WE ARE GOING TO BE ABLE TO ARGUE THAT THIS IS FRAUD ON THE COURT, THAT WE THINK THIS IS BAD—FAITH LITIGATION.

AND, IT SEEMS TO ME THAT IF WE ARE GOING TO BE ASKING FOR PUNITIVE DAMAGES SOMEWHERE DOWN THE ROAD TO THE JURY, THAT THE JURY SHOULD KNOW THAT IT NEEDS TO CONSIDER THE LOSSES AND THE POTENTIAL LOSSES THAT THAT CLAIM HAS CAUSED.

THE COURT: LET ME TELL YOU, MR. BOUTROUS, WHAT I SEE HAPPENING HERE. THAT WHOLE ISSUE OF PUNITIVE DAMAGES IS NOT GOING TO ARISE UNTIL AFTER THE JURY HAS RESOLVED THE MAIN CLAIMS.

THEN AT THAT STAGE OF THE PROCEEDINGS IF INDEED YOU PREVAIL ON THE MAIN—PLAINTIFF'S MAIN SUIT HERE, THEN IT SEEMS TO ME THAT WE ARE IN THE SITUATION OF PERHAPS ADDRESSING THE QUESTION OF PUNITIVE DAMAGES AND ALLOWING YOU PERHAPS, DEPENDING ON THE CIRCUMSTANCES AND WHAT WE DEEM TO BE APPROPRIATE, IF INDEED PUNITIVE DAMAGES ARE GOING TO BE AN APPROPRIATE ISSUE—AT THAT POINT WE CAN RAISE THE QUESTION OF PRESENTING THAT ONE ISSUE TO THE JURY, AND YOU DOING SO, THAT PERHAPS ONCE AGAIN A LITTLE OPENING STATEMENT AND WHATEVER ADDITIONAL EVIDENCE YOU NEED TO PUT ON.

MR. BOUTROUS: WILL WE BE ABLE TO ARGUE OUR UNPAID LEGAL FEES CLAIM TO THE JURY?

THE COURT: NO; BECAUSE THAT, I BELIEVE, IS AN EQUITABLE ISSUE. I JUST REVIEWED THE LATEST CASE LAW ON THESE ISSUES AND THE MOST RECENT CASE BY THE COURT OF APPEALS HERE, WHICH IS GINBERG VS. TALBERT (PH.) THAT RECENTLY CAME DOWN, AND I THINK THAT CASE HAS ME PRETTY DARN WELL CONVINCED THAT

THIS IS A BENCH ISSUE, NOT A JURY TRIABLE ISSUE.

MR. BOUTROUS: I WON'T REARGUE OUR POINT ON THAT. BUT TO MAKE THE POINT, OUR INTERPRETATION OF THAT WAS THE COURT OF APPEALS' OTHER DECISION ON THE ATTORNEY FEE ISSUE IS THAT AT LEAST LIABILITY IS AN ISSUE FOR THE JORY.

THE COURT: IT MAY BE UNDER APPROPRIATE CIRCUMSTANCES. I AM NOT SURE THAT IN THIS CASE IT IS. INDEED, CERTAINLY I AM ABSOLUTELY PERSUADED THAT A BAD FAITH LITIGATION CLAIM WHERE YOU ESSENTIALLY ARE ARGUING ABUSE OF THE JUDICIAL PROCESS, THAT IS REALLY AN EQUITABLY-ROOTED KIND OF CLAIM, AND ANY ATTORNEY'S FEES THAT YOU WANT TO CLAIM OUT OF SUCH A LIABILITY CLAIM IS AN EQUITABLE KIND OF PROCEEDING.

MR. BOUTROUS: JUST SO WE HAVE THE PROCEDURE STRAIGHT, AS WE INDICATED IN OUR PAPERS ON THIS ISSUE, WE PLAN TO, AT THE CLOSE OF THE EVIDENCE, OR AT SOME POINT BEFORE THE CASE GOES TO THE JURY, TO ASK THE COURT TO DISMISS BREEZEVALE'S CLAIMS.

THE COURT: I WOULD IMAGINE YOU WOULD. WE WILL ADDRESS THAT AT THAT APPROPRIATE TIME, AND THAT AGAIN IS GOING TO BE SIMPLY A QUESTION OF WHETHER THEY HAVE ENOUGH EVIDENCE TO ALLOW THE ISSUES TO GO TO THE JURY. THAT IS A STANDARD THING THAT I WOULD EXPECT YOU TO DO.

MR. BOUTROUS: SO THE COURT ENVISIONS THAT —EITHER THE COURT OR THE JURY FINDS THAT THIS IS A BAD-FAITH FRAUDULENT CASE AND THE

COURT WOULD MAKE THE DETERMINATION OF THE AMOUNT OF ATTORNEY FEES THAT WE ARE ENTITLED TO, AND IF THE COURT ALLOWS US TO GO TO THE JURY ON PUNITIVE DAMAGES, WE WOULD HAVE A SEPARATE SORT OF MINI PROCEEDING.

THE COURT: I THINK THAT IS HOW IT WOULD HAVE TO OBVIOUSLY, IF THE JURY FINDS IN THE PLAINTIFF'S FAVOR ON THEIR MAIN CLAIMS, I DON'T THINK THERE IS MUCH LEFT FOR YOU TO PITCH TO THE COURT.

MR. BOUTROUS: I THINK, YOUR HONOR, THAT OUR VIEW WOULD BE THAT EVEN IF THE JURY IN OUR VIEW GOT IT WRONG, THE COURT WOULD HAVE THE POWER, AND WOULD BE ABLE TO EXERCISE THE POWER, LOOKING AT THE EVIDENCE IN A DE NOVO CAPACITY, ASIDE FROM THE COURT'S ABILITY TO OVERTURN THE JURY'S VERDICT AND SAY THIS IS A FRAUD AND SANCTIONABLE CONDUCT AND IT IS DISMISSED.

THE COURT: WHEN WE GET TO THAT BRIDGE, MR. BOUTROUS, WE WILL DECIDE WHETHER WE ARE GOING TO CROSS IT.

MR. BOUTROUS: I JUST WANTED TO MAKE OUR POSITION CLEAR.

THE COURT: I UNDERSTAND. BUT I THINK THAT THE PLAINTIFF'S MAIN CLAIMS IN THIS CASE HAVE GOT TO BE OUT OF THE WAY BEFORE WE GET TO ANY OF THOSE ISSUES AS A PRACTICAL MATTER.

MR. BOUTROUS: IF I CAN CLARIFY ONE MORE TIME FOR THE RECORD. WE PLAN TO ARGUE, AND WE WILL BE PERMITTED TO ARGUE, THAT THIS IS BAD-FAITH LITIGATION AND FRAUD ON THE

COURT IN OUR OPENING STATEMENTS TO THE JURY.

THE COURT: I DON'T KNOW WHY YOU SHOULDN'T BE ALLOWED TO DO THAT, SINCE THAT IS ONE, OF THE UNDERLYING BASES OF YOUR DEFENSE, THAT THIS LAWSUIT DOESN'T HAVE A FACTUAL BASIS. THAT IS YOUR CLAIM, ISN'T IT?

MR. BOUTROUS: THAT IS CERTAINLY ONE OF THEM.

THE COURT: BUT I SUPPOSE WHAT YOU ARE SUGGESTING—YOU ARE NOT GOING TO BE ALLOWED TO ARGUE TO THIS JURY THAT THIS IS BAD-FAITH LITIGATION. THAT IS AN ARGUMENT THAT YOU MAKE TO ME.

WHAT YOU WILL BE ALLOWED TO ARGUE TO THE JURY IS THAT THEY ARE PROCEEDING IN BAD FAITH, IF YOU SEE MY DISTINCTION.

MR. BOUTROUS: I DO. THANK YOU, YOUR HONOR.

MR. SHARFMAN: YOUR HONOR, YOUR RULINGS RAISE

* * * *

APPENDIX I

JURY INSTRUCTIONS

[6193] MR. SHARER: Thank you, Your Honor.

THE COURT: All right. Take a brief recess.

(Thereupon, a recess is taken.)

(In open court. Jury not present.)

THE COURT: Replacement page 18.

All right. Let's bring the jury in, Bruce.

(In open court. Jury present.)

THE COURT: Well, good morning, ladies and gentlemen. When we last talked, I probably have should have said come back Thursday morning at 11:40, but I didn't. And again I have to apologize to you and thank you for your patience and your indulgence, but we're now ready. And the way we're going to proceed is that I'm going to read to you the instructions on the law first, and then we will break for lunch, and then after lunch the lawyers will make their closing arguments to you.

The instructions that I'm about to read to you are instructions that you ultimately will have in the jury room to look at should you need to refer to them, so don't take notes. Don't bother. Just listen, please, carefully to the instructions knowing that you'll have them for reference in the jury room when you are actually deliberating on and deciding the case.

It's your duty, ladies and gentlemen, to accept the law as I state it to you. You should consider all of [6194] the instructions as a whole; that is, you're not to single out certain sentences, or any individual point or instruction, and ignore the others, but you are to consider each instruction with regard to and in light of the others.

Your responsibility here as the jury is to decide the facts. You and only you are the judges of the facts. You alone determine the weight, the effect, the value of the evidence, and the credibility, the believability of the witnesses.

You should determine the facts without prejudice, without fear, without sympathy, and without favor, and solely from a fair consideration of the evidence.

You should consider the evidence in the light of your own observations and experiences in the affairs of life. In short, you should use your common sense.

The actions I've taken during this trial in ruling on motions or objections by the lawyers, in comments I might have made to the lawyers, in questions that I may have put to the witnesses, or now in the setting forth the law in the instructions, are not to be taken by you as any indication of my opinion as to how you should decide the issues of fact. Indeed, as I told you at the beginning of this case, I try not to have an opinion as to the facts. And, nevertheless, if you believe that I have expressed or even hinted at an opinion as to the facts, you should disregard [6195] it, because what the verdict shall be is your sole and exclusive duty and responsibility.

Now, the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It's not appropriate for a juror on entering the jury room to voice a strong expression of an opinion on the case or to announce a determination to stand for a certain verdict. Because when one does that at the outset, a sense of pride may cause that juror to hesitate, to back away from an announced position if and when it's shown to be wrong.

Remember, that you are not partisans or advocates in this case, but judges. And the final test of the quality of your service rely in the verdict that you return right here to the

courtroom and not in the opinions that any of you may hold before agreeing on a verdict.

Bear in mind, that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in the case. And to that end I would remind you that in your deliberations in the jury room your purpose should be not to support your own opinion, but to ascertain and declare the truth.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without doing violence to your [6196] individual judgment.

To each of you I would say that you must decide the case for yourself, but you should do so only after discussing it with your fellow jurors, and you shouldn't hesitate to change an opinion when convinced that it's wrong.

You should not be influenced to vote in any way on any question that's submitted to you by the single fact that a majority of the jurors, or any one of them, hold an opinion or favor a particular decisions which differs from your own. In other words, you shouldn't surrender your honest convictions concerning the effect of the weight of evidence—for the mere purpose of returning a verdict or solely because of the opinions of other jurors.

Now if in these—in these instructions, any rule, direction, or idea is stated to you in varying ways, no emphasis thereon is intended by me and none must be inferred by you.

Now you must consider this and decide this case as an action between persons of equal standing in the community and of equal worth. Breezevale Limited is a corporation and Gibson, Dunn and Crutcher is a partnership, and they have the same right to a fair trial at your hands as a private individual has. The law is no respecter of persons. All per-

sons, including corporations and partnerships, stand [6197] equal before the law and are to be dealt with as equals in a court of justice.

Now, you may consider only the evidence that's been properly admitted into the case. And the evidence in this case has included the sworn testimony of witnesses, exhibits that were admitted into evidence,' answers to interrogatories, any facts that I may have judicially noticed, and any facts stipulated to and agreed by counsel.

During the course of the trial, certain items of documentary and testimonial evidence were admitted not for the truth, but for some reason limited purpose. I, again, instruct you that any such evidence may not be considered by you for the truth of the matter asserted, but only for the limit purpose for which the particular evidence was admitted.

In your consideration of the evidence, you're not limited solely to what you saw and heard as witnesses testified or as exhibits were admitted into evidence. Rather, you are permitted to draw from the facts that you find have been proven such reasonable inferences as you feel are justified in the light of your own experience. An inference, of course, is a deduction, a conclusion, that reason and common sense leads you to make from facts that have been proved.

If you should find that it was peculiarly within [6198] the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with caution the weaker and less satisfactory evidence actually offered on that point, unless the failure to produce the stronger and more satisfactory evidence has been satisfactorily explained.

During preparations for depositions or for trial, attorneys commonly meet with and interview potential witnesses. This is a proper and well accepted practice. It's the duty of a lawyer to object when another lawyer offers testimony or

other evidence that the objecting lawyer believes is not admissible. It is the responsible of a lawyer to object to evidence or testimony that he or she think is improper, and you must not be prejudiced in any way against a lawyer who makes such objections.

If during this trial I sustain an objection by one lawyer to a question asked by another, you're to disregard the question and you must not try to guess as to what the answer would have been.

If after a question was asked and an answer was given by a witness, I ruled that the answer should be stricken, then you're to disregard both the question and the answer in your deliberations. Likewise, any exhibits to which I sustain an objection or that I order be stricken are not evidence and you must not consider them.

[6199] The statements of counsel are not evidence and should not be considered as evidence, unless the statement or statements were made as admissions or stipulations conceding the existence of a fact or facts.

If I or the lawyers in this case have made any reference to the evidence that does not agree with your memory of the evidence, it is your memory that should control during your deliberations.

Now, the party who asserts the affirmative of an issue has the burden of proving it. This burden must generally be carried by what is termed a preponderance of the evidence. The term preponderance of the evidence does not mean such degree of proof as produces absolute or mathematical certainty, nor does it mean proof beyond a reasonable doubt as in a criminal case.

Preponderance of the evidence means such evidence as when weighed against that opposed to it, it has the more convincing force. It's a question of quality and not of quan-

tity, which is to say that it's not necessarily determined by the number of witnesses or documents bearing on a certain version of the facts.

To establish by the preponderance of the evidence is to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as when considered and compared with that opposed [6200] to it, it has the more convincing force and produces in your mind's belief that what is sought to be proved is more likely true than not true.

A party has succeeded in carrying the burden of proof by a preponderance of the evidence on an issue of fact if after consideration of all the evidence in the case, the evidence favoring that party's side of the issue is more convincing to you and causes you to believe that on that issue the probability of truth favors that party.

If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party upon whom the burden of proof on that issue rested.

In determining whether any question has been proved by a preponderance of the evidence, you should consider all of the evidence bearing on that question regardless of who produced it.

A party is entitled to the same benefit from the evidence that is in 'its favor whether it is produced by that party or by the adversary.

There are two types of evidence from which you may find the truth as to the facts of the case, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is [6201] proof of a chain of facts and circumstances from which the existence or

nonexistence of a fact in issue may logically be inferred. Both types of evidence are equally entitled to your consideration.

The law does not give greater weight to either direct or circumstantial evidence, nor is a greater degree of certainty required of one kind of evidence than of the other. So in reaching a verdict in the case, you should weigh all of the evidence that's been presented, whether it be direct or circumstantial.

In deciding whether the plaintiff has established a cause of action against the defendant by a preponderance of the evidence, you must consider and weigh the testimony of all the witnessess who have appeared before you. You alone are the judge of the credibility, the believability of the witnesses. In other words, you alone are to determine whether to believe a witness and the extent to which that witness should be believed. If there's any conflict in the testimony, you must resolve that conflict and determine where the truth lies.

In reaching a conclusion as to the credibility of a witness, and in weighing the testimony of a witness, you may consider any matter that may have a bearing on that subject.

You may consider the demeanor and behavior of the [6202] witness on the witness stand; the witness' manner of testifying; whether the witness impresses you as a truthful individual; whether the witness impresses you as having an accurate memory and recollection; whether the witness had a full opportunity to observe the matters concerning which the witness has testified; whether the witness has any interest in the outcome of this case, or friendship, or animosity toward other persons concerned with this case.

You may are consider the reasonableness or unreasonableness, the probability or improbability of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether the witness has been contradicted or corroborated by other credible evidence.

If you believe that any witness has been shown to be biased, or prejudiced, for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of that witness so as to affect the desire and capability of that witness to tell the truth.

In short, you should give the testimony of each witness such weight as in your judgment it's fairly entitled to receive.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either [6203] side. You should consider all of the facts and circumstances in evidence to determine which of the witnesses are more worthy of being believed. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side, or you may find the reverse.

A person who by education, study, and experience has become an expert in any art, science, or profession, and who is called as a witness, may give an opinion as to any such matter in which the witness is specially versed and which is material to the case.

It should be considered and weighed by you like any other evidence in the case. You're not bound by it if the facts upon which the opinion is based have not been established to your satisfaction by the evidence; however, you should not reject it if it is—if it is uncontradicted by other evidence and not inherently unreasonable.

In this case there has been a conflict in the testimonys of expert witnesses. By considering and weighing the credibility and qualifications of the respective experts who have testified, the logic of the reasons given in support of their opinions, the other evidence in this case that favors or opposes a given opinion, and by using your own experience and good judgment as reasonable and intelligent people, you must

resolve the conflict and [6204] determine which of the opinions, if any, to accept as accurate.

Now on this case, some testimony has been presented to you by way of video and other testimony has been read to you by way of deposition. You're instructed that this testimony is entitled the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight as is the testimony of witnesses who have confronted you here on the witness stand, and you're not to discount it merely because it comes to you by way of a video or in the form of a deposition.

The testimony have a witness may be discredited or impeached by showing that the witness has previously made statements that are inconsistent with the present testimony.

The prior statement is admitted into evidence solely for your considerations in evaluating the credibility of the witness. You may consider the prior statement only in connection with your evaluation of the credence to be given to the witness' present testimony in court.

You mustn't consider the prior statement as establishing the truth of any fact contained in that statement.

If you believes that any witness has been thus impeached and discredited, then it is your exclusive [6205] province to give that witness' testimony such weight, if any, as in your judgment it's fairly entitled to receive.

When a witness adopts the truth of a prior inconsistent statement, you may consider the earlier statement not only as bearing on the credibility of the witness, but also as affirmative evidence.

Now, as you know, this is an action for legal malpractice brought by Breezevale Limited against the defendants who are lawyers and who are or were partners or associates of Gibson, Dunn and Crutcher, a law firm.

During the course of these instructions, I will refer to the defendants collectively as Gibson, Dunn and Crutcher or as defendants. Gibson, Dunn and Crutcher represented Breezevale as its lawyer in a lawsuit brought by Breezevale against Bridgestone-Firestone Incorporated and Firestone Sale—Export Sales Corporation in the U.S. District Court for the Northern District of Ohio. In these instructions, I will refer to Bridgestone-Firestone, Inc. and it's affiliates simply as Firestone.

In this case, Breezevale contends that during the course of the Firestone litigation, Gibson, Dunn and Crutcher, while acting as Breezevale's lawyer, committed malpractice resulting in a settlement of the Firestone litigation for less money than Breezevale would otherwise have received.

[6206] To prevail on its claims for legal malpractice against the defendants, Breezevale must prove the following elements: First, it must prove the applicable standard of care. Second, it must prove that defendants violated this standard of care. And, third, it must prove that defendants' actions proximately caused harm. If you find that Breezevale has failed to prove any one of these elements, then you must find in favor of the defendants.

You're instructed that the degree of skill, care and learning which a lawyer is required to have and use is that degree of skill, care and learning ordinarily possessed and used by members of the legal profession in the same line of practice acting in the same or similar circumstances.

Now, as to the first element, you must determine the standard of skill and care required of defendants in their representation of Breezevale. In determining the applicable standard of care and whether it was breached, you must consider the opinions of the lawyers who have testified as expert witnesses as to the standard. You should consider each opinion and should weigh the qualifications of the witness

and the reasons given for his opinion. You must resolve any conflict in the testimony of the witnesses by weighing each of the opinions expressed against the others. Taking into considerations the logic of the reasons given for the opinion, the facts and authorities relied upon by [6207] the witness is, his relative credibility, and his special knowledge, skill, experience, training and education. Give each opinion the weight to which you deem it entitled.

Breezevale must prove an objective standard of care against which defendants' actions can be judged. An expert's opinion as to what he might personally have done under similar circumstances is insufficient to establish a standard of care.

In the District of Columbia there are Rules of Professional Conduct which govern the conduct of attorneys in representing their clients and in dealing with courts, opposing parties and attorneys, and third persons. I instruct you that these rules are relevant to establishing the standard of care which you must find is applicable to Gibson, Dunn and Crutcher's representation of Breezevale.

As to the second element, Breezevale must prove that defendants breached the applicable standard of care. In satisfying that burden, it's not enough for Breezevale to show that other attorneys would have made different decisions or taken different actions than defendants under similar circumstances. Rather, Breezevale must demonstrate that a reasonably prudent and competent attorney under similar circumstances would not have made the decisions or taken the actions defendants did.

If you find that is Breezevale has proved a [6208] standard of care and has proved that defendants breached this standard, then you must consider whether Breezevale has established a third element of showing that the breach proximately caused damages to Breezevale.

An injury or damage is said to have been proximately caused by an act or a failure to act whenever it appears from a preponderance of the evidence that the act or omission played a substantial part in bringing about the injury or damage.

Moreover, it must be shown that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

To establish the third element, therefore, Breezevale must prove that it would have obtained more than the $100,000 settlement it received from Firestone were it not for defendants' legal malpractice.

You must decide whether the outcome in the underlying Breezevale-Firestone lawsuit would have been different if Mrs. Paul's deposition had been postponed. If you conclude that Breezevale has not proved by a preponderance of the evidence that it would have made more than $100,000 but for defendants' actions, then you must find in favor of the defendants.

In answering this question, you will necessarily have to decide if Mrs. Paul told the truth or lied when she [6209] testified that offer letters and spreadsheets dated 1987 were prepared in February, 1991, with the knowledge and participation of one or more Breezevale executives.

Your answer to this question is a factor you should consider as you determine whether Breezevale would have obtained more than the $100,000 settlement it ultimately reached with Firestone.

Under the law of the District of Columbia, a plaintiff's claims barred if the plaintiff has been contributorily negligent. Contributory negligence includes intentional actions of the plaintiff that fall short of the standard to which a reasonable man should conform in order to protect himself from harm. Accordingly, if you conclude that Breezevale

forged documents in the underlying Firestone litigation and that this played a substantial part in damaging its law suit against Firestone, then you must return a verdict for the defendants.

It is defendants' burden to prove by a preponderance of the evidence that Breezevale was contributorily negligent.

In order to establish proximate causation and obtain damages from the defendants, Breezevale must prove that it would have won on one or more of its claims in its underlying case against Firestone had that case gone to trial.

[6210] This requirement that Breezevale must prove not only its claims against defendants, but also its case against Firestone, is known as the case, quote, case-within-a-case, unquote, requirement.

Breezevale must prove that but for defendants' malpractice, Breezevale would have won on one or more claims in the case-within-a-case against Firestone, and bears the burden of proving what damages it would have of recovered in the case-within-a-case.

In determining whether Breezevale would have prevailed on its case-within-a-case against Firestone, Breezevale must actually prove its case against Firestone; therefore, in deciding the case-within-a-case, you may not consider any prior settlement offers or discussions between with Breezevale and Firestone as evidence that Firestone was or is liable to Breezevale.

In the underlying case, Breezevale alleged three different legal claims against Firestone. One, breach of contract. Two, promissory estoppel. And, three, fraud.

To establish that it would have prevailed on its breach of contract claim, Breezevale must prove by a preponderance of the evidence that Breezevale and Firestone entered into a contract or contracts, that Firestone breached the contract or

contracts, and that Firestone's breach or breaches of the alleged contracts caused [6211] Breezevale to suffer damages.

A contract is an agreement or exchange of promises supported by something of value, whether oral or in writing, between two or more persons to do or not to do certain things. It's not necessary that the party use any particular words, any particular action, or any particular form of agreement. Words and phrases commonly used in daily life are sufficient if they in fact make an agreement. So too, a clear course of dealing between the parties is evidence of the terms and scope of their contract.

Every contract carries with it an obligation to act in good-faith and not to frustrate or impede the other party's performance of the contract. The legal result of making an agreement is that the parties become obligated, and the law would require them to carry out their agreements.

A contract may be either an expressed contract or an implied contract. Both types of contract have the same legal result, and the difference between them lies in how they are made. An expressed contract is formed when the exact terms of the agreement are stated by the parties to each other. An implied contract is formed when the exact terms of the agreement are not fully stated between the parties, but are derived from the words and actions of the parties.

[6212] In its suit against Firestone, Breezevale alleged that its written nonexclusive distributorship agreements with Firestone for tire sales to Iraq were modified to make them exclusive. Breezevale has the burden of proving that these agreements were Modified. In so determining, you may consider whether Breezevale has proven these modifications by preponderant evidence of oral agreements and course of dealings betweens itself and Firestone. You cannot consider whether Firestone reached exclusive distributorship agreements with Breezevale unless you have first determined

that the written agreements were modified to make them exclusive.

As to any separate oral agreement that you find was entered into between Firestone and Breezevale, if you conclude that such agreement could not have been performed within one year, then you must find for Firestone on any such agreement.

A contract is breached when one party without just cause fails or refuses to perform his or her agreement even though the other party has performed all that he or she was required to do under the agreement.

In addition, when one party to a contract frustrates the other party's attempted performance of the contract, he shall not be heard to complain about the other's inability to perform.

[6213] If you find that Firestone breached its contractual obligations to Breezevale, whatever you may find them to be, then Breezevale is entitled to be placed in the same situation it would have been in if the contract had not been broken.

Breezevale claims as damages in this case the commissions and lost profits it would have received had Firestone not breached the contract. These damages are arrived at after deducting the amount that it would have cost Breezevale to have performed the contract.

In the underlying case, Breezevale alleged that it was entitled to recover lost profits on certain sales of Firestone tires to Iraq that Breezevale alleged it would have made him but for Firestone's breach of contract.

In order to recover lost the profits, Breezevale must prove these elements. First—prove three elements. First, Breezevale must prove that at the time Breezevale entered into the distributorship agreement with Firestone, the parties contemplated the profits that Breezevale allegeedly lost. Second,

Breezevale must prove that the loss of the profits Breezevale claims was the probable result of the breach of contract. And, finally, Breezevale must prove the amount of the lost profits with reasonable certainty. Breezevale is not entitled to recover lost profits that are remote or speculative.

[6214] In addition to its claim for breach of contract, Breezevale sought damages against Firestone in connection with the construction of a tire plant in Nigeria on the theory of promissory estoppel, which is a doctrine that allows a party under certain circumstances to recover damages on promises that are other—that are not otherwise contained in a contract.

Promissory estoppel requires proof of a promise which the promisor could reasonably expect to induce action or forbearance on the part of the promisee, which does induce such or forbearance and which is binding because injustice can be avoided only by enforcement of the promise.

The promise must be clear and unambiguous in its terms. The reliance must be reasonable and foreseeable, and the party claiming estoppel must be injured by its reliance. Damages incurred in reasonable reliance on the promises may be awarded in a suit for a promissory estoppel.

To establish that it would have prevailed on its estoppel claim against Firestone, Breezevale must prove several elements. First, it must have proof that Firestone in fact made the promises that Breezevale alleges it did. Second, Breezevale must prove that Firestone should reasonably have expected the promises would induce Breezevale to take certain action to its detriment. Third, Breezevale must prove that it took action to its detriment [6215] in reliance on Firestone's promises. Fourth, Breezevale must prove that its reliance was sufficiently definite and substantial in nature, such that injustice would result if the promises were not enforced. Finally, Breezevale must prove that it suffered damages as a result of its reliance on the promises. If Breeze-

vales fails to prove any one of these elements, then you must conclude that Breezevale would not have prevailed on its claim against Firestone for promissory estoppel in the case-within-a-case.

Representations made during preliminary negotiations and promises made that were conditional upon the occurrence of some external event do not constitute sufficiently definite promises to invoke the doctrine of promissory estoppel.

Accordingly, if you find that Firestone made promises to Breezevale, but that these promises were made during preliminary negotiations, or that the promises were conditioned upon something else occurring first, then you must conclude that Breezevale would not have prevailed on its claims against Firestone for promissory estoppel in the case-within-a-case.

If you find that Breezevale would have prevailed on the theory of promissory estoppel, you must determine what damages, if any, Breezevale sustained as a result of its reliance on the promises made by Firestone.

[6216] Under a theory of promissory estoppel, the proper measure of damages is not the amount of profits and other benefits Breezevale expected to gain from Firestone's promise or promises. In other words, had Breezevale prevailed on its claim of promissory estoppel as to the Nigerian tire plant, it could have recovered only those amounts that it actually expend as a result of its reliance on the promise or promises made by Firestone. Breezevale could not have recovered as damages lost profits it might have made had Firestone kept any such promises.

In addition to its breach of contract and promissory estoppel claims, Breezevale claims that Firestone committed fraud. Breezevale alleged that Firestone made certain fraudulent statements to Breezevale concerning the 1988 and 1989 Iraq tire inquiries upon which Breezevale relied to its detriment.

Fraud is defined as a false representation of fact, whether by words, conduct or concealment, which misleads and is intended to mislead another so that he relies on it to his injury.

In order to establish that it would have prevailed on its claim of fraud, Breezevale must prove each of the following six separate elements: First, Breezevale must prove that Firestone made a false representation of fact or knowingly concealed a fact it had a duty to disclose.

[6217] A representation is false when it is not substantially true. The truth or falsity of a representation depends on the natural and obvious meanings of the words taken into consideration—taking into consideration all surrounding circumstances.

Generally, fraud must be based on a false representation of a present or past fact; however, a promise to perform a future act can be fraudulent where it is made with the present intent not to perform the act.

Second, Breezevale must prove that the misrepresented fact was material to the transaction at hand. To qualify as material, the represented fact must be important, necessary or likely to have an influence on the transaction.

Third, Breezevale must prove that Firestone intentionally misrepresented the fact with knowledge of its falsity, or with such utter disregard as to whether it was true or false that knowledge may be inferred. A person knows a representation is false when he's aware that it's not substantially true. A representation is made with utter disregard and recklessness when the person who makes the representation is completely careless or indifferent to the consequences or the risk that the representation will cause the person to whom it is made to do or not to do certain

[6218] Fourth, Breezevale must prove that Firestone intended to mislead Breezevale into relying upon it. A person

intends to mislead another to rely on a representation when it is his purpose to mislead. Intent is inferred from the way in which the representation is made, the means used, and all the facts and circumstances in evidence.

Fifth, Breezevale must prove that it justifiably relied upon the misrepresentation. Reliance is justifiable when a person of ordinary care would have relied upon the representation under the same or similar circumstances.

Six, Breezevale must prove that it suffered injury as a direct result of its justifiable reliance on the misrepresented fact. This means that the damage would not have occurred without the representation and that the damage followed from the representation in a natural and continuous sequence. If you find that Breezevale has failed to prove by a preponderance of the evidence any one or more of the elements of fraud, or if you are unable to determine what happened, you must find that Breezevale would not have prevailed on its claim of fraud against Firestone.

A person injured by fraud is entitled to such damages as will fairly compensate him for the wrong suffered. That is, the damages sustained by reason of the fraud or deceit and which have naturally and approximately [6219] resulted therefrom. This means that the party injured is entitled to receive the benefits it would have received were it not for the parties—the other party's fraudulent conduct.

If you find the defendants liable for legal malpractice, but that their malpractice was not the proximate cause of the damages to the extent claimed by the plaintiff, then plaintiff may recover only that portion of the damages which resulted approximately from defendants' malpractice.

The burden of proof is on Breezevale to establish all elements of its damage. The amount of your verdict must be based upon the evidence presented as to its losses. You are not to award plaintiff speculative damages; that is, compen-

sation which although possible is remote or guesswork. You are to base your verdict as to plaintiff's losses only upon evidence which shows their losses by a preponderance.

Counsel, would you come to the bench, please.

(Bench Conference.)

THE COURT: Are there any objections to the instructions—other than those that are already on the record?

MR. SHARER: No, Your Honor.

MR. PORET: No. We just—the objections as stated.

[6220] THE COURT: That you've already made?

MR. PORET: Yes, Your Honor.

THE COURT: Okay. But you're satisfied that I correctly read what—

MR. SHARER: You did, Your Honor.

THE COURT: Thank you. Okay. Lunch time.

MR. SHARFMAN: Can we get copies of the verdict form, Your Honor?

THE COURT: Yes. We'll do that after this.

(Open Court)

THE COURT: We're going to break for lunch now. And please come back at 1:30, and we will not keep you waiting. Arguments will begin at 1:30.

I remind you again, please, do not discuss the case. Leave that for deliberations. Okay.

See you at 1:30, please.

(In open court. Jury not present.)

THE COURT: Counsel, if you want to pick up the revised verdict forms, they're in chambers, and we can take it up later—later on today.

MR. SHARER: Thank you, Your Honor.

THE COURT: Okay.

MR. SHARFMAN: Your Honor—

THE COURT: Yes.

MR. SHARFMAN: If I could just inquire as to how

* * * *

[6511] Cook got that mailing address. See plaintiff's Exhibit 416.

THE COURT: Your time is up.

MR. SHARFMAN: Don't let them get away with it.

Thank you.

THE COURT: Ladies and gentlemen, you have heard extensive argument from both sides. I want to remind you of something that I told you in the instructions earlier. That it's your recollection that's going to control. It's not what I say, it's not what the lawyers say, but it's what you remember as to the evidence that was actually presented in this case as to what in fact the evidence is in this case.

So if in any of the statements or arguments that you have heard, you think that you have heard things that didn't comport with the evidence, it's your decision to determine what the evidence is. And I emphasize that to you again, that the statements of counsel are not evidence in the case. The evidence is what you heard from this witness stand, what you saw on that screen and the various exhibits that were admitted into evidence.

The arguments are now over, ladies and [6512] gentlemen, and this is the point at which I'm just going to give you a few more instructions, and believe me they are short, and then I will send you off, and the case will be in your hands for decision.

When you go into the jury room, the very first thing you should do is to choose a foreperson. Your foreperson will be the individual who will preside over your deliberations, and who will be your spokesperson here in court in the event that you need to communicate with us.

In order to return a verdict in this case, you must all agree to it. You must be unanimous.

And I want to take a few moments now to explain to you the verdict form that we are going to give to you for you to record your decision on. It asks you a series of questions and I will go through them with you right now, as to what the questions are and what you are supposed to do with them.

The first question that is asked of you is this. Do you find that Breezevale has established the standard of care applicable to Gibson, Dunn & Crutcher's representation of Breezevale during October and November, 1991, and that defendants breached the standard of care?

[6513] You are asked to answer that question yes or no. If your answer is no, you are done.

If your answer is yes, then you must proceed to the next question, question two. And that asks you: Do you find that Breezevale has established that Gibson, Dunn & Crutcher's breach of the standard of care proximately caused damage to Breezevale's case against Firestone?

Again we ask you to answer it yes or no. Again, if your answer at this point is no, then you are finished.

On the other hand, if your answer is yes, you must go to the third question. And that asks you this. Do you find that Gibson, Dunn & Crutcher has established that forgeries occurred, and if so, that one or more Breezevale—Breezevale executives participated in such forgeries?

Again, you are to answer it yes or no.

If the answer is yes, then you are to proceed to question number four. If your answer is no, then you are to skip four and go to five.

Question four asks you: Do you find that Gibson, Dunn & Crutcher has established that Breezevale's forgery of documents played a substantial part in damaging its lawsuit against [6514] Firestone?

Again here we ask you to give a yes or no answer. If your answer is yes, then you are finished.

If your answer is no, then you go to question number five. Now, question five and the questions that follow pertain to the case within a case.

In question five we ask you: Do you find that Breezevale has established that it would have won on one or more of its claims against Firestone?

Again we ask you to check yes or no. If your answer is no, then you are finished.

If your answer is yes, then we want you to answer questions six, seven and eight.

Question number six asks you: For whom do you find on Breezevale's breech of contract claims against Firestone?

And again we ask you here to—this is a little bit different from the others—we ask you to check for Breezevale or for Firestone. And they are broken out in the—under 1988 claim and 1989 claim.

Now should you answer as to question number six in favor of Firestone as to both the '88 [6515] claim and the '89 claim, then—then you are to go directly to question number seven as it instructs you.

On the other hand, if you find in favor of Breezevale on either or both of the claims, that is for '88 and '89, then you are to enter the amount of damages Breezevale has proved on,

on his—on this claim or claims. And, again, it shows you where to record that information.

Question number seven asks you: For whom do you find on Breezevale's fi[illegible] claims against Firestone?

Again it's broken out in the same fashion for Breezevale, for Firestone, and divided up between 1988 claim and 1989 claim.

Again, here if your answer is, is in favor of Firestone on both of these claims, you should go to question number eight.

On the other hand, if your answer is in favor of Breezevale on either or both of these claims, then you are to enter the amount of damages that Breezevale has proven on these claims, or this claim.

There is an important thing that I need to explain to you. Ladies and gentlemen, you have been [6516] instructed that the damages for breach of contract and fraud are the same. The measure of damages is the same. So if you make a determination in this case that there has been both a breach of contract and a fraud as to one or more of the categories, you must reach the same amount of damages. It has to be the identical amount, because the measure of damages for fraud and breach of contract is the same.

Question number eight asks you: For whom do you find on Breezevale's promissory estoppel claim against Firestone relating to the Nigerian tire factory project?

Again here you are to check either for Breezevale or for Firestone. If you find in favor of Firestone on this claim, then you are done.

If you find in favor of Breezevale on this claim, then you are to enter the amount of damages that Breezevale has proven on this claim.

So, ladies and gentlemen, that's the verdict form that you are to use, and I hope that it's clear and self-explanatory. If not, we will try to clarify it for you.

As I indicated, before, whatever verdict you return, whatever decision you reach, you must all agree to it. You must be unanimous.

[6517] If during the course of your deliberations you need to communicate with us, you can do so by way of a note signed by the foreperson or signed by any other member of the jury.

And please understand that you should not attempt to communicate with the Court other than by means of a signed writing. And I will not communicate with any of you about this case other than by means of a signed writing, or perhaps here in open court.

And finally, ladies and gentlemen, this is an important point, you are not to reveal to anyone, not even to me, how you stand numerically on the claims in this case until after you have reached a unanimous decision.

Counsel, you want to come up to the bench for one moment, please?

(Thereupon, counsel for both parties approached the bench and conferred with the Court, as follows:)

THE COURT: Anything else?

MR. SHARFMAN: I object to your cutting me off. You didn't give me the four minutes that you said you would, Your Honor.

THE COURT: Mr. Sharfman, you got five [6518] minutes. And you know you—I'm outraged by that comment. I gave you more than you are entitled to, much more. And for you to come up here and make this comment, I'm not likely to for get it.

Step back.

(Thereupon, the proceedings at the bench were concluded, counsel for both parties returned to their seats at counsel table; the proceedings continued as follows:)

THE COURT: All right, ladies and gentlemen, the case is: yours. You take your pads with you, and we will bring you all these exhibits, the verdict form and jury instructions. And you may begin.

(Jury out at approximately 2:45 p.m.)

APPENDIX J

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

[Filed Oct. 30, 1996]

Civil Action No. 94ca10818

BREEZEVALE LIMITED,
Plaintiff,

v.

TIMOTHY L. DICKINSON, *et al.*,
Defendants.

VERDICT FORM

(1) Do you find that Breezevale has established the standard of care applicable to Gibson, Dunn, & Crutcher's representation of Breezevale during October and November 1991 and that defendants breached the standard of care? (check one):

YES ☒ NO ☐

If your answer is "No," then you are finished. If your answer is "Yes," go to Question 2.

(2) Do you find that Breezevale has established that Gibson, Dunn & Crutcher's breach of the standard of care proximately caused damage to Breezevale's case against Firestone? (Check one):

YES ☒ NO ☐

If your answer is "No," then you are finished. If your answer is "Yes," go to Question 3.

(3) Do you find that Gibson, Dunn, & Crutcher has established that forgeries occurred and, if so, that one or more Breezevale executives participated in such forgeries? Check one:

YES ☒ NO ☐

If your answer is "Yes," go to Question 4. If your answer is "No," go to Question 5.

(4) Do you find that Gibson, Dunn, & Crutcher has established that Breezevale's forgery of documents played a substantial part in damaging its lawsuit against Firestone? (Check one):

YES ☐ NO ☒

If your answer is "Yes," then you are finished. If your answer is "No," go to Question (5).

(5) Do you find that Breezevale has established that it would have won on one or more of its claims against Firestone? (Check one):

YES ☒ NO ☐

If your answer is "No," then you are finished. If your answer is "Yes," answer Questions 6, 7 and 8.

(6) For whom do you find on Breezevale's breach of contract claims against Firestone?

	1988 Claim	1989 Claim
For Breezevale	~~$1.5 million~~	~~$730,000~~
For Firestone	_____	_____

If you find for Firestone on both these claims, go to Question 7.

If you find in favor of Breezevale on either or both these claims enter the amount of damages Breezevale has proved on this claim(s).

1988 $1.5 million

1989 $730,000

(7) For whom do you find on Breezevales's fraud claims against Firestone?

	1988 Claim	1989 Claim
For Breezevale	☒	☐
For Firestone	☐	☒

If you find in favor of Firestone on both these claims, go to Question 8.

If you find in favor of Breezevale on either or both these claims, enter the amount of damages Breezevale has proved on this claim(s).

1988 $1.5 million

1989 $_____

(8) For whom do you find on Breezevale's promissory estoppel claim against Firestone relating to the Nigerian tire factory project? (Check one):

For Breezevale ☒

For Firestone ☐

If you find in favor of Firestone on this claim, then you are finished.

If you find in favor of Breezevale on this claim, enter the amount of damages Breezevale has proved on this claim.

$ 1.2 million

Oct. 29, 1996
Date

/s/ [Illegible]
Foreperson